No. 4694.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Frances Investment Company, a corporation,

Appellant,

vs.

Jasper Thomason,

Appellee.

BRIEF FOR APPELLEE.

WM. T. KENDRICK,
GURNEY E. NEWLIN,
A. W. ASHBURN,

Solicitors for Defendant Jasper Thomason, Appearing Specially Herein for the Purpose of Contesting Jurisdiction Over Person and Not Appearing Generally Herein.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

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Statement of Facts.

This action was brought primarily for the foreclosure of certain mortgages and, as an incident thereto, the vacation of a certain Torrens Title proceeding had in the county of Imperial, California, which resulted in a decree adversely affecting the said mortgages so sought to be foreclosed. Appellee, Jasper Thomason, was not a party to the original bill. As amended by the "Amended Supplemental Bill in

Equity," the proceeding retained its original purpose and sought to subject to the title of the mortgagee and the foreclosure sale the title of certain subsequent grantees, who were alleged to have taken with full knowledge of the plaintiff's rights. Said amended pleading likewise sought an accounting from various parties of any money or property which they had received out of the alleged wrongs. The words "fraud" and "conspiracy" are frequently used, but the foregoing is the essence of the proceeding.

Judge James, of the District Court, made an order quashing service of the subpoena and vacating judgment as to the defendant-appellee, Jasper Thomason. It is conceded that no personal service of subpoena was made upon him and that no order was ever made pursuant to Equity Rule 15 designating any person other than the marshal to make service of same. It was shown conclusively that at the time of the attempted service, Rosamond Mildred Thomason (now Rosamond Mildred Hunt), defendant's only unmarried daughter, was but seventeen years and five months of age. [Tr. p. 156.] Appellant must stand upon its proof of substituted service, which necessitates strict adherence to the method prescribed by Equity Rule 13. Thomason at no time appeared in the action, until he made his motion to vacate the judgment. He was not even a witness at the trial. The subpoena issued upon the original bill did not name him. The subpoena on the supplemental bill was directed to him, but no apparent attempt at service on him was made. [Tr. pp. 116-118.]

The subpoena upon the amended supplemental bill was issued May 9, 1921 [Tr. p. 215]; it was delivered to the marshal that same day [Tr. p. 216], and the purported service was made by Deputy W. S. Walton on May 13, 1921. [Tr. pp. 216-218.] In all, four returns of service were made by Walton. Under date of May 13, 1921, his return, filed June 10, 1921, shows substituted service by leaving of copy "with Miss Thomason." [Tr. p. 218.] The return, as filed in the clerk's office, says: "I hereby certify that I received the within writ on the 9th day of May, 1921, on Jasper Thomason ~~and Meryle T. Davis~~ by delivering to and leaving with Miss Thomason for Jasper Thomason, said defendants named therein, personally, at the county of Los Angeles in said district, a copy thereof." By error, the copy of the return printed at page 218 of the transcript fails to show the original insertion and the later elimination of the words "and Meryle T. Davis" (but see stipulation for diminution of record filed herein). It seems apparent that the marshal did not at that time conclude that he had served Mr. Thomason's married daughter, Meryle T. Davis. The decree states that she was never served as a defendant. [Tr. p. 228.]

On October 4, 1923 [See Mr. Lewinson's affidavit, Tr. p. 249], Mrs. Davis was examined in open court, and her own affidavit [Tr. p. 264] shows that the object of the examination was to lay basis for an amended return of service. Mr. Lewinson, in the morning session of court, stated that the marshal's term had expired and that the deputy who had made

the service was then in Seattle and not available for the purpose of making such amendment [Tr. p. 264],—this, notwithstanding the fact that Walton's affidavit shows that only "several days prior to October 4, 1923," he had in the court room discussed with Mr. Lewinson the very amendment which he later filed on October 4. [Tr. p. 277.] During the noon hour, an amended return was made and filed by the said deputy. [Tr. p. 217, Rider, and Tr. p. 265.] That return also shows service on "Miss Thomason." The testimony of Mrs. Davis, given at the morning session, did not warrant the conclusion that the youngest sister, Rosamond, was eighteen years of age at the time of service [Tr. pp. 262, 263, 265], and any doubt on the subject was clarified by the explanation given at the afternoon session. [Tr. p. 266.] She at that time stated that the attempted service had been made upon her youngest sister, *i. e.,* Rosamond.

In the light of this information, the deputy marshal on October 5, presumably at the instance of counsel for plaintiff, made a second amended return in the shape of an affidavit, which was verified October 5 and filed October 12. [Tr. p. 217.] He still adhered to the statement that he had left the copy with "Miss Thomason."

A decree *pro confesso* was entered as to the defendant Thomason on October 12, 1923. [Tr. p. 221.]

A "final decree" was entered against Thomason, and others, on March 24, 1925. [Tr. pp. 222-242.] The bill alleged that Thomason had no financial in-

terest in the transactions involved in the case. [Tr. p. 143.] The prayer of the said amended supplemental bill asked merely for a foreclosure and that defendants account for any money or property received by them and that complainant have general relief. [Tr. p. 146.] The decree adjudged Thomason liable for any deficiency which might occur upon the foreclosure sale [Tr. p. 227], but provides that the said judgment "shall be for not to exceed the highest and best value of the property comprising plaintiff's security at any time between October 2, 1917, and the date of this decree, together with the value of any of the fruits, avails, rents, issues and profits of said security, or any part thereof, that has come into the hands of said defendant." Thomason was not a maker of any of the notes or mortgages which were being foreclosed; it was not alleged that he had received any money or property through the alleged wrongs; and he was apparently held liable upon the theory that he had permitted himself to be used as a conduit in putting the property beyond the reach of plaintiff and thus had rendered himself liable as a party to the alleged conspiracy.

On April 15, 1925, Thomason gave notice of motion to quash service of summons and vacate the said judgment. [Tr. p. 149.] This notice states "that the defendant, Jasper Thomason, has appeared specially and does hereby appear specially in the above entitled action through the undersigned, his solicitors, for the sole purpose of making the motion hereinafter mentioned; that the said Jasper Thomason has not ap-

peared generally and does not appear generally in this action" [Tr. p. 149], and that he "appears herein solely and only for the purpose of making the said motion on the said ground of want of jurisdiction over his person." [Tr. p. 151.] See, also, praecipe for special appearance, at page 233. The said notice of motion stated that it would be made upon the grounds "that no subpoena in the said cause was ever delivered to the defendant personally and that the only service or attempted service of subpoena herein was made by leaving a copy thereof with Rosamond Mildred Thomason on the 13th day of May, 1921, at a time when the said Rosamond Mildred Thomason was under the age of 18 years and was not an adult person, and that no service or attempted service of subpoena herein was made upon any other person or at any other time than upon the said Rosamond Mildred Thomason on the said 13th day of May, 1921 * * *." [Tr. p. 151.]

Attached to the said notice of motion was an affidavit made by Jasper Thomason in support thereof, in which he thus expressly limited the authority of his solicitors in the premises: "This affidavit is made for the purpose of enabling affiant to make a special appearance in the above entitled action through Wm. T. Kendrick, Esq., and Newlin & Ashburn, Esqs., who are *hereby designated as his solicitors, for the said purpose, which said special appearance shall be made for the sole purpose of moving this court to quash service* of the subpoena herein and vacate and set aside * * * the "Final Decree" entered herein

on the 24th day of March, 1925, *upon the ground that the said court has not and at no time has had jurisdiction over the person of this affiant.*" [Tr. p. 154.]

The motion was also supported by affidavits of Thomason's wife and daughter Rosamond. [Tr. pp. 157-161.]

This motion to quash was submitted before Judge James on April 27, 1925. [Tr. p. 246.] On April 29th Mr. Lewinson made a further affidavit in opposition to said motion [Tr. p. 249], in which he referred to the original return of May 13, 1921, and the amended return of October 4, 1923, and said "said deputy United States marshal who signed said return and said amended return advises affiant that he served said subpoena as in said amended return set forth," *i. e.,* on "Miss Thomason." Mr. Lewinson at the trial relied upon the proposition that the marshal's return was conclusive [Tr. p. 267], and in his memorandum of authorities in opposition to the motion to quash, filed April 29, 1925, contemporaneously with the last mentioned affidavit, he likewise took the position that the amended return of the marshal could not be impeached by defendant Thomason. [Tr. p. 168.]

It was only after service of Thomason's reply brief on April 30, 1925 [Tr. p. 213], wherein counsel well nigh conclusively showed that the return could be impeached [Tr. pp. 185-196], that Mr. Walton or counsel for plaintiff ever conceived the idea of service on anyone but Rosamond.

Having evolved this idea, counsel on May 7, 1925, applied for leave to amend the return *nunc pro tunc* [Tr. p. 268], and presented therewith "in support of the return of the United States marshal, dated May 11, 1921," an affidavit of said W. S. Walton, verified May 7, 1925. In this application counsel applied for leave to file the amended return of October 4, 1923, *nunc pro tunc* and to further amend the return so as to eliminate the statement that process had been served on Miss Thomason and to make it appear that the same was served by leaving a copy with "Jane Doe, whose true name is to the undersigned unknown." [Tr. p. 268.] This application, together with the Walton affidavit, was served upon counsel so appearing specially for Thomason on the said 7th day of May. [Tr. pp. 270, 279.] Whether this was done because of some requirement of Judge James (see King v. Davis, 137 Fed. at 210; 157 Fed. 676), or was designed by counsel for plaintiff as a trap for Thomason's solicitors, does not clearly appear. The memorandum of authorities, which was served as a part of said application, clearly discloses that the same was made for the purpose of defeating the pending motion. It says in part: "Such amendment may be permitted by the court *upon the hearing of a motion to vacate* the judgment even though no notice of such proposed amendment has previously been given to the moving party." [Tr. p. 272.] Appellant's brief herein admits that such was the purpose of the application. At pages 99 and 100 thereof, counsel say:

"In the court below defendant heavily emphasized the point that plaintiff's motion to amend the return was occasioned by defendant's motion to quash, and that the two were argued together; at least somewhat. A fair reading of the record leaves no doubt that this is true, but what of it? * * * Although defendant's brief and affidavits in opposition to the motion to amend were occasioned by the motion to amend, which was occasioned by the motion to quash, they were not filed in support of the motion to quash."

The proposed amendment, which was later filed [Tr. p. 216], and the Walton affidavit recede from the position that service had been made on "Miss Thomason" and attempt to substitute an unnamed married daughter—"Jane Doe" [Tr. pp. 275, 276, 278]—said to be twenty-six years of age at the time of service. [Tr. p. 275.] Referring to the Lewinson affidavit of April 29, 1925, it appears that none of the daughters of Thomason was twenty-six years of age *on May 13, 1921.* [Tr. p. 249.] It also appears from the testimony of Meryle T. Davis, given at the trial, that the oldest daughter was twenty-four years of age on that date. [Tr. p. 265.] Likewise, the affidavit of Verna Thomason Stark, the oldest daughter, shows that she was on that date but twenty-four years of age. [Tr. p. 312.] In their heading of Point III of their brief (pp. 36 and 89 thereof), counsel take the position that the copy was delivered to Meryle T. Davis, but in their argument they do not commit themselves definitely to this proposition.

The affidavits which were considered by Judge James show without contradiction that Jasper Thomason had

a wife and four daughters—Verna, Meryle, Gladys and Rosamond; that on May 13, 1921, Rosamond was the only unmarried daughter and the only one who was a member of Thomason's family or residing therein [Tr. pp. 298, 305, 307, 308.] Verna, Mrs. Stark, resided with her husband in San Pedro [Tr. p. 312]; Mrs. Gladys Schupp resided with her husband in Antelope Valley [Tr. pp. 308, 309]; Jasper Thomason and wife were, on the date of the attempted service, with Mrs. Schupp at her home [Tr. pp. 308, 310]; Meryle T. Davis was also married and was not living with her father at that time. [Tr. pp. 298, 302, 305, 308.]

It appears from the opinion filed by Judge James [Tr. p. 321] that all of the affidavits which had been presented were considered by him and that he accepted as true those allegations of the affidavits presented on behalf of Thomason which were directly in conflict with the affidavit of Walton. He said:

"The *affidavits presented on behalf of said defendant show that the deputy marshal attempted to make service upon a daughter of said defendant, who was at the time seventeen years of age;* that the said daughter had appeared at the door of the residence and that a screen door, which stood between her and the deputy marshal, was latched; that said daughter refused to accept the 'papers' and that the deputy marshal left them on the floor of the porch of the premises." (Italics ours.)

Also:

"The original return and the first amended return were definite that the service was made upon a 'Miss

Thomason,' but the *final amended return* as now presented and filed *shows that the officer must have been without any certain knowledge of the name of the person upon whom he made service when he filed his earlier certificate."* (Italics ours.)

Counsel, inveighing much against the character and *alleged* conduct of defendant Thomason and his relatives, seek by the frequent use of such phrases as "gravest frauds," "steeped in fraud," "conspiracy," "dastardly crimes and frauds," "evading service," and the like, to divert the attention of this court from the real issues involved in the appeal and, by indirection, to persuade this august tribunal to join in counsel's passionate disregard of the real facts disclosed by this record. The cold fact, which a sober examination of this record reveals, is that the District Court never acquired any jurisdiction whatever over the defendant Thomason and that any adjudication of fraud or the like which is contained in the judgment and directed at the defendant Thomason is simply *coram non judice*. He not only was not served with process, but he made no appearance in the action; was not present at the trial even as a witness, and is no more bound by the broad assertions of the complaint and the judgment than he would have been if such judgment had been entered upon the original bill which did not name him as a party. For the purpose of the consideration of this appeal, he must be deemed entirely guiltless of any of the alleged wrongs.

Counsel say that Thomason was guilty of the alleged wrongs because he dodged service of subpoena as a

witness. This argument they base upon the affidavit of Mr. Lewinson wherein he states (necessarily upon hearsay, in its larger part) that Thomason "evaded process." [Tr. p. 250.] This conclusion is based upon the statement that the subpoena was placed in the hands of the marshal for service, without any statement of any efforts made by the marshal to locate the witness. Everyone knows that in these modern days of large cities no marshal or sheriff ever attempts to serve any process except upon information furnished to him by the party desiring it served, and it does not appear that Mr. Lewinson gave the marshal any information whatever. The affidavit also alleges that the Pinkerton Detective Agency "employed numerous operatives to locate said Thomason and serve said subpoena," but what information they had as a basis for their efforts or what, if any, efforts they made are wholly matters of speculation. This assertion of evasion of process is doubtless of a piece with Walton's pretense of showing that Thomason evaded service of the subpoena *ad respondendum.* He says [Tr. p. 275], referring to the subpoena upon the amended supplemental bill, "that prior to being placed in my hands said subpoena had been in the hands of three deputy United States marshals for service, and the same had not been served." This is obviously false, for the subpoena was not issued until May 9, 1921, and each and every of his returns thereon shows that it was delivered *to him* on the said 9th day of May and that only four days expired between the original delivery of the process to him and his al-

leged service thereof. One of his returns is in the form of an affidavit and states that he received the writ on May 9; certainly that affidavit does not purport to speak of the receipt by the marshal, but is directed toward the receipt of the writ by affiant himself. Under those circumstances, it could not possibly have been in the hands of three deputies prior to its delivery to him. In his same affidavit of May 7, he states that he served the writ on May 9, which is the same day it was received by him.

Much is said by counsel for appellant to the effect that Jasper Thomason is guilty of "the gravest frauds" and, inferentially, that he should not be heard to deny service because, forsooth, his daughter, Meryle T. Davis, made a false return of service and his son-in-law, or former son-in-law, H. F. Davis, was the arch criminal who devised and engineered the alleged conspiracy. So far as Mrs. Davis is concerned, it appears from the face of the judgment [Tr. p. 228] that any finding of wrongdoing on her part was made in the absence of jurisdiction over her, or of her being represented as a party to the cause. We do not know what the merits of the judgment are with respect to Mr. Davis, but we do know that no man is to be condemned unheard because, perchance, he may have had a rascal for a son-in-law.

Much is made by counsel of the *alleged or assumed* knowledge of Thomason of the pendency and purpose of this litigation, the claim being that he has gambled with the results of the law suit and should not be re-

lieved from the burden of the judgment, even though the same be void. Such argument comes with poor grace from this plaintiff-appellant. Its original bill shows affirmatively that it is just such reliance upon the necessity of formal service of process that caused all plaintiff's trouble and which lies at the basis of its appeal to a court of equity in this instance. The bill alleges the commencement of the Torrens Title proceeding and also shows an equity suit started in the same jurisdiction for the purpose of accomplishing the same end,—namely, avoiding the plaintiff's mortgage as fraudulent. [Tr. pp. 62-64.] It further appears therein that, although no order for publication of summons was made, copy of the summons and complaint in the said equity action was mailed to plaintiff's predecessor in interest and received by it, and that a like copy was served upon a clerk of plaintiff's predecessor in the state of Utah. The bill alleges that these things were done, the defendants Austin herein (plaintiffs therein), "well knowing or believing that the Delta Land & Water Company *and the plaintiff herein,* being non-resident corporations, would not appear in said action unless due and proper substituted service were made upon them in the manner provided by the Code of Civil Procedure of the state of California" [Tr. p. 63], and that, at or about the time of the delivery of the said summons and the complaint to the said clerk, "the Delta Land & Water Company *and the plaintiff,* through their attorney, made due inquiry to ascertain if service by publication had been ordered by the court in said action, and *upon learning*

that no affidavit or order therefor had been made, did not appear in said action." [Tr. p. 64.] Had they not rested upon their right to technical service of process; had they, knowing of its pendency, appeared in the said equity suit, the alleged fraud of which they now complain could not have been perpetrated and they would not now be in the utterly inconsistent attitude of inveighing against the inaction of Thomason. He was never served with process in their action, and in fact is not shown to have had knowledge of the pendency thereof.

BRIEF OF ARGUMENT.

Point I.

THE RETURN OF SERVICE OF SUBPOENA IS NOT CONCLUSIVE.

Return Not Complete or Self-supporting.

Substituted service must proceed strictly.

Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110, 1111;

King v. Davis, 137 Fed. 198, 206, 207, 157 Fed. 676;

Harris v. Hardeman, 14 How. 336, 14 L. Ed. 444;

Blythe v. Hinckley, 84 Fed. 228 (C. C., N. D. Cal.).

Returns filed prior to making motion to vacate were insufficient.

[Tr. pp. 216-218.]

Affidavit presented with proposed amendment was made in support of previous return.

[Tr. pp. 268, 271.]

The amendment and affidavits are to be construed together.

Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 277;

Fountain v. Detroit etc. Co., 210 Fed. 982.

Amendment found to be untrue before its filing.

[Tr. pp. 320-322.]

Leave to amend could, under these circumstances, have been properly denied.

Phoenix Ins. Co. v. Wulf, 1 Fed. 775, 779;

King v. Davis, 137 Fed. 198, 210, 157 Fed. 676;

Bayley, Petitioner, 132 Mass. 457;

Wolcott v. Ely, 2 Allen 338;

Boyd v. Dean, 8 Sask. L. 1;

Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 277;

Fountain v. Detroit etc. Co., 210 Fed. 982.

Return, Though Complete on Its Face, May Be Impeached.

Formal legal notice to defend is essential to due process.

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, 572;

Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, 705;

Simon v. Southern Ry. Co., 236 U. S. 115, 59 L. Ed. 492, 497.

There is no "absolute verity" to a record of a void judgment.

Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444;

1 Freeman on Judgments, Sec. 228, p. 448 (5th Ed.);

3 Freeman on Judgments, Sec. 1201, p. 2494;

Mechanical Appliance Company v. Castleman, 215 U. S. 437, 54 L. Ed. 272;

1 Foster's Fed. Prac., Sec. 167a;

Blythe v. Hinckley, 84 Fed. 228, 111 Fed. 827;

Peper Automobile Co. v. American Motor Car etc. Co., 180 Fed. 245 (C. C. E. Dist. Mo.);

Higham v. Iowa etc. Assn. (C. C. Mo.), 183 Fed. 845;

Parmalee Co. v. Aetna Life Ins. Co., 166 Fed. 741 (C. C. A., 7th Cir.);

Joseph v. New Albany etc. Co., 53 Fed. 180 (distinguished);

Von Roy v. Blackman, Fed. Cas. No. 16,997, 3 Woods 98,100 (distinguished);

Trimble v. Erie Elec. Motor Co., 89 Fed. 51 (distinguished);

Nickerson v. Warren etc. Co., 223 Fed. 843;

Bradley Mfg. Co. v. Burrhus, 135 Ia. 324.

Action against marshal is not an adequate remedy. [Tr. pp. 277-278.]

3 Freeman on Judgments, Sec. 1229, p. 2558.

Point II.

THE COURT HAS NO POWER TO IMPOSE CONDITIONS UPON THE GRANTING OF A MOTION TO VACATE, WHERE THERE HAS BEEN NO ACTUAL SERVICE.

No Knowledge on Thomason's Part Shown.

[Tr. pp. 258, 308, 257, 309.]

Actual Knowledge Is Legally Inconsequential.

32 Cyc. at 462;

National Metal Co. v. Greene Con. etc. Co., 11 Ariz. 110;

Wilmer v. Pica, 118 Md. at 550;

Caldwell v. Glenn, 6 Rob. (La.) 9;

Osborne & Co. v. Columbia etc. Corp., 38 Pac. 160, 161 (Wash.);

Harrell v. Mexican Cattle Co., 73 Tex. at 615;

Bradley Mfg. Co. v. Burrhus, 135 Ia. 324;

Savings Bank v. Authier, 52 Minn. 98;

Wilcke v. Duross, 144 Mich. 243 (syllabus);

O'Connell v. Gallagher, 104 N. Y. App. Div. 492;

Kochman v. O'Neill, 202 Ill. 110;

Mass. etc. Assn. v. Lohmiller, 74 Fed. 23 (C. C. A., 7th Cir.) (distinguished);

Cowden v. Wild Goose etc. Co., 199 Fed. 561, 565 (distinguished);

Martin v. Gray, 142 U. S. 236 (distinguished).

No Waiver of Statute of Limitations Necessary.

Federal equity courts apply state limitations only to the extent that it is equitable.

1 Foster's Fed. Prac., Sec. 181, pp. 1050, 1051;
Kirby v. Lake Shore etc. R. R. Co., 120 U. S. 130, 30 L. Ed. 569, 572;
Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 206.

Filing of bill tolls statute only where followed by diligent effort to effect service.

U. S. v. American Lumber Co., 85 Fed. 827 (9 C. C. A.);
U. S. v. Miller, 164 Fed. 444 (Dist. Ct. Ore.).

No Offer to Defend Is Necessary.

Davidson Bros. Marble Co. v. U. S. *ex rel.* Gibson, 213 U. S. 10, 53 L. Ed. 675.
Bacon v. Federal Reserve Bank, 289 Fed. 513, 515.

Point III.

THE EVIDENCE IS SUFFICIENT TO REBUT THE MARSHAL'S RETURN AND AFFIDAVIT.

Copy of Writ Was Delivered to Rosamond.

[Tr. pp. 153, 157, 160, 216, 217, 218, 228, 249, 253, 258, 264, 265, 262, 263, 266, 298, 302, 305, 307, 308, 309, 310, 312, 320, 322.]

(See, also, Stipulation for Diminution.)

This Court Revises Only Palpable Errors of Fact.

U. S. v. Marshall, 210 Fed. 595 (8 C. C. A.);
Schlafly v. U. S., 4 F. (2d), 195, 198.

Oral Hearing Not Proper Procedure.

Mechanical Appliance Company v. Castleman, 215 U. S. 437, 54 L. Ed. 272;

Higham v. Iowa etc. Assn., 183 Fed. 847;

Peper Automobile Co. v. American Motor Sales Co., 180 Fed. 245;

American Cereal Co. v. Eli Pettijohn Cereal Co., 70 Fed. 276;

Wall v. C. & O. Ry. Co., 95 Fed. 398;

Benton v. McIntosh, 96 Fed. 132.

Service on Married Daughter Not Compliance With Rule 13.

Married daughters were not residing in Thomason's home.

[Tr. pp. 298, 305, 308, 302, 261.]

Service upon a married daughter not residing in defendant's home is not a service upon a member of defendant's family.

Heinemann v. Pier, 85 N. W. 646 (Wis.);

Colter v. Luke, 108 S. W. (Mo. App.);

Poor v. Hudson Ins. Co., 2 Fed. 432, 438, 25 C. J. at 664;

Jackson v. Smith, 200 Pac. 542 (Okla.).

Point IV.

ROSAMOND THOMASON WAS NOT AN ADULT PERSON WITHIN THE PURVIEW OF EQUITY RULE 13.

"Adult Person" Means One of Full Legal Age.

1 Street's Fed Eq. Prac., Sec. 595, at 371;

Banco de Sonora v. Bankers' Mut. Cas. Co., 100 N. W. 532, 535 (Iowa);

Schenault v. State, 10 Tex. App. 410, 411, 1 C. J. at 1403.

Cal. C. C., Sec. 25:

"Minors, Who Are. Minors are: 1. Males under twenty-one years of age; 2. Females under eighteen years of age."

Cal. C. C., Sec. 27:

"Adults, Who Are: All other persons are adults."

There Was No Showing That Rosamond Was an Adult Within Appellant's Definition.

There are no presumptions in favor of the return.

Harris v. Hardeman, *supra;*

Blythe v. Hinckley, *supra.*

It is incumbent upon the officer to affirmatively show in his return full compliance with the rule.

King v. Davis, *supra;*

Blythe v. Hinckley, *supra;*

Harris v. Hardeman, *supra.*

Point V.

DEFENDANT'S OPPOSITION TO THE MOTION TO AMEND RETURN OF SERVICE DID NOT WORK A GENERAL APPEARANCE.

Appellant's Argument Denies Any Substantial Efficacy to Special Appearance.

Under appellant's theory, defendant's motion would have been defeated by a showing of service upon some-

one other than Rosamond, had defendant not opposed the motion; likewise, his motion was defeated by reason of his opposing plaintiff's attempt to defeat his motion by amending the return.

The facts pertaining to the alleged general appearance:

[Tr. pp. 233, 270, 274, 279, 280, 281, 291, 292, 314, 320, 296.]

Appellant's Authorities Are Opposed to Federal Rule.

Stubbs v. McGillis, 44 Colo. 138 (distinguished);

Bestor v. Inter-County Fair, 135 Wis. 339 (distinguished).

Federal Rule Is That Waiver of Special Appearance Is Matter of Intent.

Southern Pac. Co. v. Arlington Heights Fruit Co., 191 Fed. 101 (C. C. A., 9th Cir.);

Kelley v. T. L. Smith Co., 196 Fed. 466 (7 C. C. A.);

4 C. J. at 1333;

2 R. C. L. at 322;

Sterling Tire Corp. v. Sullivan, 279 Fed. 336 (distinguished);

Dahlgren v. Pierce, 263 Fed. 841 (C. C. A., 6 Cir.);

Grable v. Killits, 282 Fed. 185;

Garvey v. Compania etc., 222 Fed. 732 (Dist. Ct. Tex.);

General Investment Co. v. Lake Shore etc. Ry. Co., 260 U. S. 261, 67 L. Ed. 244 at 252;

Salmon Falls Mfg. Co. v. Midland etc. Co., 285 Fed. 214;

Pine Hill Coal Co. v. Gusicki, 261 Fed. 974, 977;

Yanuszauckas v. Mallory S. S. Co., 232 Fed. 132, 133;

Davenport v. Superior Court, 183 Cal. 506.

Appellant's authorities distinguished:

Everett Ry. etc. Co. v. U. S., 236 Fed. 806;

Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495;

Briggs v. Stroud, 58 Fed. 717;

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659;

Placek v. American Life Ins. Co., 288 Fed. 987.

ARGUMENT.

Point I.

THE RETURN OF SERVICE OF SUBPOENA IS NOT CONCLUSIVE.

Return Not Complete or Self-supporting.

In discussing this point, counsel for appellant assume that the cause is in the same state as if our motion to quash had been originally directed to the last amended return, filed herein on July 15, 1925. But such is not the case. At the time of the submission of the motion, the amendment showing service on "Jane Doe" had not been suggested. The motion

was directed at the returns then on file, the last of which, filed October 12, 1923 [Tr. p. 217], was neither complete nor self-supporting.

Constructive or substituted service must proceed strictly in accordance with the statutory authority (Settlemier v. Sullivan, 97 U. S. 444, 24 L. Ed. 1110, 1111), and the return of service must affirmatively show performance of all the acts necessary to acquiring jurisdiction in this vicarious manner. Settlemier v. Sullivan, *supra;* King v. Davis, 137 Fed. 198, 206, 207, 157 Fed. 676; Harris v. Hardeman, 14 How. 336, 14 L. Ed. 444.) In the King case, *supra,* a return was held insufficient because it did not state that the defendant's wife was a member of his family. In the Settlemier case the return was held fatally defective because of failure to state that the officer was unable to effect personal service upon the defendant. In Blythe v. Hinckley, 84 Fed. 228 (C. C., N. D., Cal.), Circuit Judge Morrow held, or strongly intimated, that a return was insufficient which stated that service had been made upon an adult "who is a resident in the place of the abode" of defendant, because the return did not state that she was a member or resident of the family of said defendant.

The return in question (October 12, 1923) did not state, except by way of recital, that Miss Thomason was an adult person at the time of service. It was equivocal as to whether she was a person upon whom service could be legally made, for it stated that she was then "a member *or* resident in the family of Jasper Thomason." The disjunctive of course does not

comply with the statutory requirement. It merely shows that the officer is in doubt as to the fact. The said return likewise shows that the process was left "at the dwelling house *or* usual place of abode" of defendant,—again evincing an unwillingness on the part of the officer to definitely commit himself as to facts.

In Nickerson v. Warren City etc. Co., 223 Fed. at 845 (cited by appellant), it is said:

> "Whenever the question of service is raised in determining the validity of a judgment obtained by default and without notice in fact to the defendant, and because of this without opportunity to present the defense, the record may properly be closely scrutinized to see that there was valid service."

The earlier returns of the marshal were more clearly subject to attack than the one which we have just discussed. [Tr. pp. 216-218.] These matters having been called to the attention of counsel and the court [Tr. p. 185], the affidavit of Walton and the application for leave to further amend were filed "in support of the return of the United States marshal dated May 11, 1921." [Tr. p. 268.] The court's attention was at that time called by plaintiff's counsel to authorities which they claimed to warrant the use of affidavits in support of the marshal's return. [Tr. p. 271.] Judge James had all these matters before him in considering the motion to quash, and, in the written opinion in which he authorized the amending of the

return, he likewise found the said amendment to be untrue. [Tr. pp. 320-322.]

Counsel thus predicate the argument upon an amended return established and found prior to its filing to be false.

Judge James could very properly have denied the application for leave to amend upon the ground which he states in his opinion as the basis for his granting the motion to vacate, namely, untruth of the facts stated in the return. (Phoenix Insurance Co. v. Wulf, 1 Fed. 775, 779; King v. Davis, 137 Fed. 198, 210, 157 Fed. 676; Bayley, Petitioner, 132 Mass. 457; Wolcott v. Ely, 2 Allen 338; Boyd v. Dean, 8 Sask. L. 1.) Under these circumstances appellant cannot complain of the fact that Judge James, contemporaneously with permitting the filing of the amended return, looked through its *pro forma* aspect to the real substance of untruth which lay behind.

It is likewise true that the said amended return must be read in conjunction with the affidavits which were filed in support of it and in opposition to it upon the motion for leave to amend. (See cases last cited above; also Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 54 L. Ed. 272, 277; Fountain v. Detroit etc., Co., 210 Fed. 982.) Thus read, the amended return again turns out to be wholly incomplete and not self-supporting. We say incomplete, for, as found by Judge James, it appears that the officer does not know whom he served. We say "not self-supporting" because it affirmatively appears that not only does the

officer not know the identity of the person to whom he attempted to deliver the papers, but because it also appears, as found by Judge James, that the facts stated in his affidavit are untrue. True, Mr. Walton averred stoutly, "I know of my own knowledge that the facts stated in said return and said amended return are true" [Tr. p. 278], but it very clearly appears from the affidavit itself that his alleged knowledge was gained wholly from conversation with an unnamed person and that he neither knows the age, the identity or the relation to appellee of the person mentioned in his affidavit, except as he acquired the same from his conversation with that person, if such conversation did take place. He does not even venture to name the individual with whom the conversation is claimed to have occurred. The original return shows clearly that he did not understand it to be Meryle Davis, the person whom counsel now claim to have been served; in that return, he deliberately struck out the words "and Meryle T. Davis," which he had previously inserted therein. Judge James said: "The final amended return as now presented and filed, shows that the officer must have been without any certain knowledge of the name of the person upon whom he made service when he filed his earlier certificate."

It is thus apparent that the premise upon which counsel base their argument of the conclusiveness of the marshal's return is wholly non-existent,—the return is neither complete nor self-supporting.

Counsel virtually concede that a return which is not so complete and self-supporting can be impeached upon a motion such as the one here involved.

Return, Though Complete on Its Face, May Be Impeached.

But the large preponderance of Federal authorities and of sound reasoning clearly establishes that the return, even though complete and self-supporting upon its face, may be impeached in such a proceeding as this.

Realizing the import of the decisions which we are about to cite, counsel for appellant seek to draw a distinction between those cases which involve service by constructive process upon non-residents and service by substitution upon residents. The distinction is fundamentally unsound, for it is of the essence of due process of law that service of notice in the manner prescribed by law must be made before any man can be held to personal obligation upon any judgment.

Speaking of the requisites of due process of law, the Supreme Court in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, 572, said of judicial proceedings:

> "To give such proceedings any validity, there must be a tribunal competent by its constitution,—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

Again, the court speaks of it as a "principle of natural justice which requires a person to have notice of

a suit before he can be conclusively bound by its result" (p. 571).

In Mexican Central R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, 705, the court said:

> "But it is well settled that no court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears."

In Simon v. Southern Ry. Co., 236 U. S. 115, 59 L. Ed. 492, 497, it was held that service of process within the state in the manner prescribed by statute was not effective in giving a court of the state jurisdiction over a suit against a foreign corporation doing business within the state as to a cause of action arising in another state, and, speaking of judgments rendered upon service other than that prescribed by law, the court said:

> "Such judgments are not erroneous and not voidable, but, *upon principles of natural justice,* and *under the due process clause* of the 14th Amendment, are *absolutely void.* They constitute no justification to a plaintiff who, if concerned in executing such judgments, is considered in law as a mere trespasser."

And again (p. 501):

> "As the company made no appearance, the default judgment was void. Being void, the plaintiff acquired no rights thereby and could be enjoined

by a Federal Court from attempting to enforce what is *a judgment in name,* but *a nullity in fact.*" (Italics ours.)

It would be as logical to say that jurisdiction could be acquired in an attachment suit, within the purview of the Pennoyer case, *supra,* by making a mere return of seizure of the *res* without actually following the prescribed process for such seizure, as to say that personal judgment can be rendered against one who is physically within the jurisdiction without having given him the notice prescribed by law. The foregoing cases disclose, what is self-evident, that jurisdiction over the person is just as essential as jurisdiction over the subject matter, and that in each case it is jurisdiction in the "absolute" sense, jurisdiction required by the concepts of due process of law.

No "Absolute Verity" to a Record of a Void Judgment.

Counsel for appellant say that the only objection to the conclusive rule as applied to returns of service is that urged against denying a man his day in court, and they discuss the matter as if this were a mere rule of convenience to be applied at the discretion of the court. This, of course, is but a wading in the warm shallows. A plunge into the depths takes one into the cold waters of constitutional law.

That no court can evade the 14th Amendment *by merely declaring,* through its officers or its own decree, that it has jurisdiction, where the requisites of due process have not been observed, is very clearly

established by the reasoning of Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444. The court there held insufficient a return of substituted service which did not comply with the state statute or the existing rule of the United States Circuit Court, and for that reason pronounced the judgment void. The court said in part:

> "In reviewing the decision of the Circuit Court, it should be borne in mind, as a rule to guide and control our examination, that the judgment impugned before that court was a judgment by default, and that in all judgments by default, whatever may affect their competency or regularity, every proceeding, indeed, from the writ and indorsement thereon, down to the judgment itself, inclusive, is part of the record, *and is open to examination.* * * * In reference to the first inquiry, it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was a party or privy; that *no person can be in default with respect to that which it never was incumbent upon him to fulfill.* The court entering such judgment by default could have no such jurisdiction over the person as to render such personal judgment, unless, by summons, or other process, the person was legally before it. A court may be authorized to exert its powers in reference either to persons or things—may have jurisdiction either *in personam* or *in rem,* and the existence of that jurisdiction, as well as the modes of its exercise, may vary materially in reference to the subject matter to which it attaches. Nay, they

may be wholly inconsistent; or at any rate, so much so as to not be blended or confounded. This distinction has been recognized in a variety of decisions, in which it has been settled that a judgment depending upon proceeding *in personam* can have no force as to one on whom there has been no service of process, actual or constructive; who has had no day in court, and no notice of any proceeding against him. That *with respect to such a person, such a judgment is absolutely void; he is no party to it, and can no more be regarded as a party than can any and every other member of the community.* * * *" (Italics ours.)

Speaking of the contention that the record cannot be disputed because it "imports perfect verity," the court quoted with apparent approval the following language:

"But it is contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and therefore the supposed record is, in truth, no record. *If the defendant had not proper notice of, and did not appear to, the original action,* all the state courts, with one exception, agree in opinion that *the paper introduced as to him is no record, but if he cannot show, even against*

the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense, by a process of reasoning that, to my mind, is little less than sophistry. The plaintiffs, in effect, declare to the defendant—the paper declared on is a record, because it says you appeared; and you appeared because the paper is a record. *This is reasoning in a circle.* The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. *Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction,* and he ought not, therefore, to be estopped from proving any fact which goes to establish the truth of a plea alleging the want of jurisdiction." (Italics ours.)

Counsel for appellant are not much impressed with the "absolute verity" proposition, as appears from page 46 of their opening brief. They rather invoke a rule denying the benefit of due process of law upon a pure argument of convenience, namely, the greatest good for the greatest number in the expediting of the processes of courts of justice. To state it in its true light is to refute the argument without further discussion.

The general rule upon the subject is stated in 1 Freeman on Judgments, Sec. 228, page 448 (5th Ed.), as follows:

"* * * the decided preponderance of authority justifies, or rather requires, a court, on motion being made to vacate its judgment because

it was without jurisdiction over the person of the subject matter, to inquire whether such was the fact, and if so, to grant the relief sought. When a motion to vacate a judgment, on the ground that defendant had never been served with process, is made, it is doubtless incumbent on the moving party to clearly prove his case, especially where the judgment recites due service of process; but *to hold that he must establish it by the record is to deny him relief in all cases in which relief is necessary;* for if a judgment record proclaims its own invalidity, it must be denied effect everywhere, and it is of little or no consequence whether it is formally set aside or not, generally, though there is a return showing that process was served, this return may be contradicted on motion to vacate the judgment and the motion granted, if, not withstanding the return, the court is convinced that it had not acquired jurisdiction over the defendant."

3 Freeman, Sec. 1201, page 2494:

"So the remedy by motion is an adequate method of securing relief from a judgment regular on its face, on the ground that there was no service of process, though the sheriff's return shows service, unless there be special reasons in the particular case why the statutory remedy is inadequate."

The preponderance of authoritative Federal decisions is to the same effect.

Mechanical Appliance Company v. Castleman, 215 U. S. 437; 54 L. Ed. 272. The case having been removed from the state court to the Federal Court, the

Circuit Court ruled that the return of the sheriff was conclusive as to service upon the agent of a corporation stated by him to be doing business within the state. The circuit judge refused to consider the affidavits which were tendered for the purpose of impeaching the sheriff's return. The ruling was reversed, the Supreme Court saying in part:

> "The circuit court should have considered the question upon the issues of fact raised, as to the presence of the corporation in Missouri and the authority of the agent upon whom service had been attempted. * * * These affidavits are made part of the record by a bill of exceptions, and we think they should have been considered upon the question of jurisdiction.
>
> "As we have already indicated, the learned circuit court was in error in holding that the return of the sheriff in the state court concluded the parties."

The case went up from the Eastern District of Missouri. The Supreme Court declined to follow the decision in Smoot v. Judd, 184 Mo. 508, upon which appellant lays great stress in the case at bar.

1 Foster's Federal Practice, Section 167a, says:

> "If the marshal or his deputy make the service, his unverified return is sufficient. This may be contradicted, although there is a remedy by an action against the officer for a false return. The marshal's return, that the corporation served was transacting business within the district, can be contradicted; so can his return that the person

on whom the service was made was authorized to represent the defendant for that purpose."

The leading case in this jurisdiction is Blythe v. Hinckley, 84 Fed. 228, decided by Judge Morrow sitting in Circuit Court. The discussion of the point here involved begins on page 239. The return showed service on Florence Blythe Hinckley, "by delivering to and leaving with Mrs. Harry Hinckley, an adult person, who is a resident in the place of abode of Florence Blythe Hinckley, said defendant named herein, at the county of Alameda in said district, an attested copy thereof, at usual place of abode of said Florence Blythe Hinckley, one of the defendants herein." Judge Morrow said:

> "It will be observed that the return does not show that Mrs. Harry Hinckley, to whom a copy of the subpoena was delivered, was a member or resident of the family of Florence Blythe Hinckley; and it is contended that this departure from the requirement of the rule is fatal to the service, and therefore renders the decrée absolutely void. It appears that Mrs. Harry Hinckley is the wife of the brother of the deceased husband of the defendant Florence. The difference between leaving a copy of a subpoena at the dwelling house or usual place of abode of the defendant with some adult person who is a member or resident of the family of the defendant, and leaving it with a person who is a resident of the place of the abode of the defendant, is certainly very great, and might be very important. * * * But it is said that the return of the marshal is that he has made personal service of the subpoena on

> Florence Blythe Hinckley, and that, as there is nothing in his certificate as to the method of making the service inconsistent with this return, a good and sufficient service will be presumed. It is also further contended that, if the return is defective in this respect, the defect has been cured by the recital in the decree that the subpoena 'had been duly and regularly served within the Northern district of California upon the respondent in said cross bill of complaint.' The doctrine here invoked to support the decree would be applicable if the decree were now being subjected to a collateral attack. In such a proceeding every intendment would be indulged in support of the decree, and whatever appeared in the record as having been done would be presumed to have been rightfully done."

It will be observed from the court's discussion that it in effect held delivery to a person who in point of fact would in all probability deliver the subpoena to the defendant, was not sufficient in the absence of a showing of a strict compliance with the equity rule. Mrs. Harry Hinckley, to whom the subpoena was delivered, was the sister-in-law of the defendant and the return showed that she was an adult person and residing in the usual place of abode of the defendant. Every argument which plaintiff makes in the instant case relative to the actual probability of the defendant having received the subpoena would be equally applicable to the Hinckley case. But the point of the decision is that the Supreme Court has prescribed by its equity rule 13 the conditions which it deems neces-

sary to warrant the assumption that a substituted service by leaving copy with a third person would actually reach the defendant, and those conditions are (1) that the copy be left with an adult person, (2) who is a member of or resident in defendant's family, and (3) at the usual place of abode or dwelling house of the defendant. This is a method of substituted service. All authorities agree that such method of service must be strictly pursued.

Counsel for appellant seek to distinguish the Blythe case by classing it as "not a motion to vacate, but to let in and defend." In this respect counsel have, we think, misconceived the true purport of the case. At the bottom of page 233 the statement of facts made by the court says that Florence Blythe Hinckley "filed a petition to have the judgment of July 3, 1897 set aside and vacated on the ground that she had never been served with any process or received a copy of any process issued upon said cross bill; that she had never seen or received said cross bill or a copy thereof; that no cross bill or any copy thereof, or any process or any copy of any process, had ever been delivered to her or left at her dwelling house or usual place of abode with any adult person who was ever a member or resident in her family." At page 239:

> "and it is contended that this departure from the requirement of the rule is fatal to the service and therefore renders the decree absolutely void."

The court says nothing about the application being one for leave to come in and defend. The only language of the case from which such an intimation could

be drawn is that found at page 240, upon which counsel for appellant herein rely. The court was there considering the question of collateral attack and attendant presumptions. The language quoted by appellant herein is, we think, *dictum* or, at best, *arguendo*. Certainly the court did not seek to impose upon Mrs. Hinckley any condition such as that of showing meritorious defense or filing an answer or otherwise submitting to the jurisdiction; the conclusion of the decision, so far as she is concerned, is this:

> "It follows from these considerations that the court, in the exercise of a sound discretion, if not recognizing an absolute right, must set aside and vacate the decree of July 3, 1897, as far as it affects the interests of the defendant Florence."

The report of this same case in 111 Fed. 827, at 835 and 836, shows plainly that our construction of the decision is correct. It is there affirmatively disclosed that Judge Morrow's order quashed service without condition and dismissed the action upon the cross bill as to the said defendant Florence Blythe Hinckley.

Counsel likewise seek to distinguish the Blythe case upon the ground that the court held the return of service to be defective upon its face. This is not quite accurate; the court said:

> "If the court is limited in its inquiry to the subpoena and its return, it is difficult to see how it can find that the requirements of the rules as to the service of process have been followed with such precision in obtaining jurisdiction over the defendant that it would be justified in refusing to set aside the decree."

The court then entered into an examination of the affidavits submitted for the purpose of impeaching the return as to the statement therein that Mrs. Harry Hinckley was a resident in the place of abode of Florence Blythe Hinckley and found, as a matter of fact, that the latter was not a permanent resident at the place where the subpoena was served and that therefore the equity rule had not been complied with. The decision is a clear recognition of the right to impeach a false return.

Peper Automobile Co. v. American Motor Car Etc. Co., 180 Fed. 245 (C. C. E. Dist. Mo.) is directly in point. That was a motion to quash service of summons in a law case, on the ground of want of jurisdiction over the person by reason of failure to serve the writ. Judge Pollock said, in part:

> "However, the question here presented is not one which arises as to the jurisdiction of the court over the subject-matter of the litigation. Jurisdiction over the subject-matter is conceded. The question here presented touches only this one matter: *Did the court by the service of the summons, as shown by the return of the marshal, acquire jurisdiction over the person of the defendant? The determination of this question must rest on the actual facts, and not upon the accuracy of the decision of the marshal of the question* as to whether the defendant was at the date of the service doing business in the state and district, and, if so, whether the person on whom the writ was served was the representative of the defendant in the doing of such business, for as defendant, by the declaration of plaintiff made for the pur-

pose of showing the jurisdiction of the court over the subject-matter of the litigation, is alleged to be a corporate citizen of the state of New York, it must of necessity have been engaged in doing business in this jurisdiction, else it was not amenable to the process of this court without its consent." (Italics ours.)

Higham v. Iowa etc. Assn. (C. C. Mo.) 183 Fed. 845. The court had under consideration a return of service upon a foreign insurance company. It said in part:

"In the Federal court it is proper practice to try the question of the sufficiency of the service of a summons by motion to quash the return, supported by affidavit, and in the absence of statute a Federal court is not required by the act of conformity to follow the state practice of trying this question."

Speaking of statutory requirements with respect to service of summons upon local officers for the purpose of giving jurisdiction over foreign corporations, the court said:

"Such provisions, however, must not encroach upon *that principle of natural justice which requires notice of a suit to a party before he can be bound by it.* * * * The question always turns upon the character of the agent or representative; whether he is such that the law will imply the power and impute the authority to him. *It is always open to show* that the agent stands in no representative character to the company, that his duties are limited to those of a subordi-

nate employe, or to a particular transaction, or that his agency had ceased when the matter in suit arose." (Italics ours.)

Frank Parmalee Co. v. Aetna Life Insurance Co. 166 Fed. 741 (C. C. A. 7th Cir.) grew out of a policy issued by defendant, insuring plaintiff against liability for accidents. The Parmalee Company was sued for personal injuries and service within the territorial jurisdiction was attempted by leaving a copy with one Gany, who, according to the sheriff's return, was Secretary of the said company. No other attempted service was made. The Parmalee Company never learned of the alleged service until after its default had been entered in the action. It accidentally learned of the default and transmitted to the insurer all of the facts in its possession. The insurer declined to assume the defense of the suit upon the ground that the insured had failed to furnish it within the time specified in the policy with a copy of process served. The action proceeded to judgment, and the Parmalee Company sought by the case reported in 166 Fed. to recover from the Insurance Company upon the said policy. The Insurance Company took the primary position that the sheriff's return was conclusive in the damage action upon the Parmalee Company, and that, as it could not be there heard to deny service of process, it could not in the instant action be heard to deny the truth of the sheriff's return. The Circuit Court of Appeals held that the Parmalee Company was not bound in the damage action by the sheriff's return but that the same could have been impeached, and that

by furnishing promptly to the insurance company all the information it had, the assured had performed its duty under the policy. The court, speaking through Judge Grosscup, said in part:

> "But is this a case in which the return, in the Whelock case, cannot be challenged? Many cases are cited by defendant in error, illustrating the circumstances under which an officer's return upon a summons may not be contradicted. Bank of Eau Claire v. Reed, 232 Ill. 238, 240, 83 N. E. 820, 122 Am. St. Rep. 66; Brown v. Kennedy, 82 U. S. 600, 21 L. Ed. 193; Trimble v. Erie Electric Motor Co. (C. C.) 89 Fed. 51; Joseph v. New Albany etc., Co. (C. C.) 53 Fed. 180; United States v. Gayle (D. C.) 45 Fed. 107; Walker v. Cronkite (C. C.) 40 Fed. 133; Hunter v. Stoneburner, 92 Ill. 75, on page 79; Fitzgerald v. Kimball, 86 Ill. 396, 397; Reddish v. Shaw, 111 Ill. App. 337, 338; Irvin v. Smith, 66 Wis. 113, 27 N. W. 35, 28 N. W. 351; 18 Enc. Pleading & Practice, p. 967. But none of these cases bear any analogy to the case under review. Surely had appropriate action been taken in the action in which the summons was issued, the verity of the return might have been challenged and tried."

Counsel at bar would evade this decision upon the ground that the question arose collaterally. The distinction is not sound, for the question decided by the Circuit Court of Appeals was whether the Parmalee Company could in the original action have impeached the sheriff's return, and its rights and duties with respect to the insurance company were determined in the light of what its rights were in the matter of im-

peaching the sheriff's return in the damage action. In other words, the court decided in the case against the insurance company that the Parmalee Company directly, or through the insurance company, could have shown in the original action that the sheriff's return was false.

Nor was the force of this decision weakened by the second ground therein contained, namely, that, assuming the summons to be one that should have been forwarded to the defendant, there was in any even substantial compliance with the conditions of the policy. It is at most a resting of the decision upon two separate grounds, and if either of them be dictum it is the latter ground.

Counsel say that the decision must be so construed because of its approval of Joseph v. New Albany etc. Co., 53 Fed. 180, a case upon which appellant heavily relies herein. All that was said about that case was that it was one of a number "illustrating the circumstances under which an officer's return upon a summons may not be contradicted." The Joseph case was decided in the Circuit Court, District of Indiana. The language of the decision clearly distinguishes it from the general current of Federal authorities, for it there appears that by court rule the Federal judge was bound to follow the state statute.

> "Whatever may be the rule in other states in regard to the effect of the return of an officer in executing mesne or final process, I think it the settled law in this state that the return of a sheriff showing that he has served the writ in the manner

> prescribed by the statute, for the purpose of giving the court jurisdiction, is conclusive against a collateral attack. * * * It is not necessary to determine what the rule of law touching the question under consideration may be in other jurisdictions. This court has, by rule, adopted the statute of this state in regard to the service of process in actions at law; and therefore the statute of this state, as interpreted by its highest judicial tribunal, must rule the question in actions at law in this court."

The Parmalee case arose in the Circuit Court of the Northern District of Illinois. In the light of these facts, it is clear that the Circuit Court of Appeals in the Parmalee case distinguished the Joseph case upon the ground that the latter was a marked exception to the general rule.

Appellant relies on Von Roy v. Blackman, Fed. Cas. No. 16,997; 3 Woods 98, 100. While the court does use the language quoted at pages 51-52 of appellant's brief, that language is justly characterized in Note 2 to Sec. 167a of Foster's Federal Practice (page 970) as dictum; for the court actually held the return of service to be defective on its face because of the fact that it showed that the copy had been left with a person residing at defendant's domicile but did not show him to be a member of the family.

Trimble v. Erie Electric Motor Co., 89 Fed. 51, apparently proceeds, as did the Joseph case, upon a construction of state law. While it is not clear, the inference from Circuit Court Rule 86, which is quoted on page 51, and the whole tenor of the decision is that

it was a question of state law pure and simple which was under consideration. That case was decided in the Western District of Pennsylvania in 1898 and relied upon a number of early Pennsylvania decisions. In 1915 the case of Nickerson v. Warren etc. Co., 223 Fed. 843, was decided in the Eastern District of Pennsylvania, the court there saying:

> "Whenever the question of service is raised in determining the validity of a judgment obtained by default and without notice in fact to the defendant, and because of this without opportunity to present the defense, the record may properly be closely scrutinized to see that there was valid service. * * * The earlier cases in Pennsylvania laid down the doctrine that the return of the sheriff could not be questioned, but for the purpose of bringing the defendant into court was conclusive, and, as it must be accepted as verity, the defendant was remitted to his plea in abatement of his action for a false return. *This rule has, however, latterly been somewhat relaxed, and the principle has been modified,* at least to the extent that where the return of the sheriff is not in itself complete, in the sense of not being wholly self-supporting, there a motion would be entertained, and the facts inquired into and determined by the court. This modification implied the converse, that when the return is complete and self-supporting, the old rule still pertains. *The rulings have nevertheless shown a drift, and the courts avow it in the direction of permitting an inquiry into the real facts, and allowing the return to stand or setting it aside in accordance with the facts as found by the court.* Park Bros. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334; Fulton v. Asso-

> ciation, 172 Pa. 117, 33 Atl. 324; Hagerman v. Empire Slate Co., 97 Pa. 534.
>
> This is the attitude of the courts of the United States." (Italics ours.)

The court then proceeded to inquire into the verity of the facts shown by the marshal's return, held it to be substantially true but defective in form, and gave leave to amend the same.

In the case of Bradley v. Burrhus, 135 Ia. 324, the court gives this common sense reason for its holding that the return can be impeached:

> "as the court would not enter a judgment upon a false return, if advised in advance, it should be free to set aside, as between the parties, at least, when subsequently the falsehood is made to appear."

Action Against Marshal Not Adequate Remedy.

The case of Smoot v. Judd, 184 Mo. 508, and other state decisions upon which appellant relies, proceed upon one of two grounds: either (a) the absolute verity of the record (which theory is pretty well exploded by the Harris case, *supra*), or (b) the proposition that an action against the marshal is an adequate remedy. Of this last mentioned view, 3 Freeman on Judgments, Sec. 1229, page 2558 says:

> "But the obvious and conclusive answer to this line of argument is thus briefly stated in the opinion of the Supreme Court of Tennessee: 'The action for a false return is an inadequate remedy for such an injury; for it might be that after a ruinous sacrifice suffered in the payment of a

> judgment so recovered, and the delay and expense of litigation with the officer who made the false return, he might be unable to make a proper indemnity, or succeed in evading his liability'."

The Smoot case is an excellent example of the adequacy (?) of the remedy upon the officer's bond. The injured party was there relegated to such an action, recovering a judgment for $1.00 against the sheriff, and was by the Supreme Court of Missouri denied any relief in equity. It is this decision which the Supreme Court of the United States declined to follow in the Mechanical Appliance case, *supra*. The case at bar is a striking example of the inadequacy of such a remedy. The amended returns filed on October 4, 1923, October 12, 1923 and July 15, 1925 were made by one who had ceased to be a deputy United States marshal and were made in the name of a marshal who had likewise gone out of office. For aught that appears, the incumbent marshal had nothing to do with the amendments, except the physical act of filing the amendment of October 4, 1923 (tr. p 277, 278). Certainly it was no part of his duty to amend a return of his predecessor in office. His bond covered only "the faithful performance of said duties by himself and his deputies" (R. S. Sec. 783; U. S. Comp. Stat. Sec. 1307.) Clearly no recovery could be had on his bond. And it is equally certain that no recovery could be had upon the former marshal's bond, because he participated in no manner in the making of the return. It does not even appear that the permission of himself or his surety was had for the making of

said amendment, or that they knew of it; and the condition of his bond would doubtless be limited to such acts as were performed by him during his term of office.

Point II.

THE COURT HAS NO POWER TO IMPOSE CONDITIONS UPON THE GRANTING OF A MOTION TO VACATE, WHERE THERE HAS BEEN NO ACTUAL SERVICE.

No Knowledge on Thomason's Part Shown.

Under their contention that the "rule of conclusiveness" should be adopted "in a modified form", counsel for appellant take the position that the decree should not be vacated unless the defendant shows absolutely no knowledge of the litigation, and a meritorious defense, and offers to waive the statute of limitations and to come in and defend. This argument as applied to the instant case rests upon two assumptions which are not warranted. In the first place, it is assumed as an established fact that Jasper Thomason had actual knowledge of the pendency of the litigation. Waving the banner of fraud, counsel would have the court substitute surmise and conjecture for legal proof. It must be remembered that the amended bill charges Thomason merely with having permitted himself to become a conduit for title and shows that he had no financial interest in the transaction; that he was not a party to the original bill; that no apparent effort was made to serve him with subpoena on the supplemental bill; that no personal service was made upon him and that his family know nothing of his ever hav-

ing actually received the copy of the subpoena which was left with Rosamond (Tr. p. 258, 308.) At the time he made his affidavit, the question of actual knowledge as distinguished from service had not been raised and his affidavit did not anticipate the defense. By the time that the point had been advanced, his health and mentality were so seriously impaired that at times he was not rational. He was suffering from a severe nervous breakdown (Tr. p. 257) and was actually confined in a sanitarium (Tr. p. 309); hence it was impossible to show directly that he had not received the copy or did not actually know of the pendency of the litigation. All that plaintiff can produce as a basis for its charge of knowledge is the family relationship, the unfounded claim of evasion of process and the general cry of fraud and conspiracy.

Actual Knowledge Is Legally Inconsequential.

Be that as it may, the question of knowledge of the litigation or actual receipt from a third person of the process is legally a false quantity. This proposition rests upon the basic principle that due process of law requires that a defendant be summoned into court in the manner prescribed by law and that there is no substitute therefor except his voluntary appearance.

That knowledge cannot take the place of legal notice is established by the following authorities:

32 Cyc. page 462, says:

> "If all that the statute requires is done, it is immaterial that defendant in fact receives no actual notice thereof; and conversely, if the statute

is not complied with it is of no avail that defendant does in fact receive actual notice of the action."

National Metal Co. v. Greene Con. etc. Co. 11 Ariz. at page 110: The National Metal Company, appellant, brought suit against the Greene Consolidated Copper Company and another. A demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment thereon was rendered for the defendants. From this judgment plaintiffs appealed.

"The complaint, in the briefest substance, alleges that plaintiff is a foreign corporation not at any time engaged in the transaction of business in this territory except in isolated transactions in the nature of interstate commerce; that in March, 1903, the defendants sued the plaintiff in the district court of Santa Cruz County; that in that suit the sheriff made return of summons certifying that he had served the same upon one Pellegrin, the agent of the plaintiff (defendant in that suit); that plaintiff did not appear in that action or answer therein; that on June 23, 1903, being the last day of the term of that court, the court rendered personal judgment by default against the plaintiff; that the said Pellegrin was not at the time of such alleged service, and never had been, the agent of the plaintiff in any manner or for any purpose whatsoever; that on April 4, 1903, *an officer of the plaintiff received a letter, at the New York office of plaintiff, from A. L. Pellegrin & Co., stating that service of summons had been made upon them in the action referred to,* and that they had notified both of the plaintiffs in that

action and their attorneys that they were not, and never had been, the agents of plaintiff; that plaintiff did not receive either from Pellegrin & Co., or from any other source a copy of the summons; that at the time of said service the said Pellegrin gave notice to the sheriff serving him and to the plaintiffs in that action that he was not, and never had been the agent of the plaintiff for any purpose whatsoever; that after receiving notice of the rendition of the said judgment, plaintiff in November, 1903, filed in said action its motion to quash said pretended service of process and to vacate, annul and set aside said default judgment, which motion was denied. * * *

1. It seems manifest from the statements and argument of counsel that the trial court sustained the general demurrer to this complaint upon the authority of the decision of the Circuit Court of Appeals for the Seventh Circuit of Massachusetts, Benefit Life Assn. v. Lohmiller, 74 Fed. 23, 20 C. C. A. 274. The most pertinent expression in this case is: 'If it be conceded that the complainant was not properly served, and that the judgment was voidable, or even void, that condition is not of itself sufficient to warrant interference; but an equity must be presented aside from that bare circumstance, showing that the injured party was without knowledge, was taken by surprise and had no opportunity, in fact, to obtain a hearing. So far as it appears from the allegation of this bill, the complainant may have possessed full and timely information of all the proceedings, but refrained from making any motion, relying upon the assumed defect, and if such were the fact the remedies are legal only. Neglect

of the opportunity which was then open for a hearing would bar equitable relief.' But this expression must not be taken as a statement of a general rule, applicable in all situations. It must be understood in the light of the facts. In that case the association was engaged in business in the state and actual service had been made upon resident agents of the association, professedly under a general statute authorizing such service. The fact of agency was not disputed, but that a different agent should have been served was contended. It was not averred that the agents served, either collusively with the plaintiff in the action in which process was served, or at all, had failed to acquaint the proper officers with the service; but it was urged that service should have have been made under a special statute, upon a special agent for service of process, and not under a general statute authorizing service upon any agent. Applied to those facts, the statements quoted have a very different bearing from that had if they are applied to the facts in this case; we cannot accept them as applicable to these facts. Here the plaintiff was advised by a stranger that the stranger had been served with process in a case against plaintiff. The credit it may have given to this information is immaterial. *If it relied upon the information and believed that a suit had been instituted against it, it nevertheless could appropriately ignore the matter, and assume that the court would not proceed to judgment until service should be made. A distinction is to be observed between knowledge of the pendency of a suit and notice thereof.* Jurisdiction can be acquired, if one does not sub-

mit himself to it, in no other way than by actual notice or by constructive notice. Actual notice is given only by personal service of process; constructive notice, by some form of substituted service. Some decisions which superficially may appear to oppose our conclusion may be reconciled with it by observing that it is often held, and properly so, that actual notice may sometimes be given, although there is a formal defect in the manner of service; in considering the matter the word 'knowledge' is occasionally used inaccurately for 'notice' and vice versa. In such case there has been service despite the informality. The time to attack such service by reason of such informality is prior to judgment. A failure so to attack the service may amount to a waiver of the informality; and one who has ignored such service, and thereby has lost an opportunity to be heard in the case may have no just cause for complaint after judgment. *But where there is no service these is no notice, irrespective of any knowledge which the defendant may acquire informally. Notice is given only by service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge upon notice or to force him into court to defend himself.* The supreme court of the United States recognized this in Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 612, 19 Sup. Ct. 308, 43 L. Ed. 569. After reference to certain notices provided to the company, it is said: 'We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service on the agent in the state where the suit was commenced.' Again: 'Process sent (to a nonresi-

dent) out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.' Pennoyer v. Neff, 95 U S. 727, 24 L. Ed. 565 Still further: 'No court can exercise, at common law, jurisdiction over a party unless he is served with the process within the territorial jurisdiction of the court or voluntarily appears.' Mexican Cent. R. Co. v. Pinkney, 149 U. S. 209, 13 Sup. Ct. 865, 37 L. Ed. 699. 'It is not sufficient', says Alderson on Judicial Writs and Process, pages 227, 228, Sec. 111, 'that a defendant have actual notice (knowledge) of a proceeding against him; he must be summoned in a lawful manner.' The point we are making is clearly pointed out again by the supreme court of the United States in Fitzgerald etc. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 39, 34 L. Ed. 608, as follows: 'So that, whether the president of this company was inveigled into Lancaster county or not, the service upon him amounted to no more than an informal notice only, and did not bring the company into court, and this the company was bound to know, and must be held to have known. Without regard to the evidence relied on to show that there was concealment of the circumstances in relation to the service, knowledge of these circumstances was wholly immaterial, in view of the fact that the service was unavailing to bring the defendant into court, unless it chose to come there.' * * * The distinction between actual service, though defective, and entire absence of service is interestingly illustrated in the decisions in the case of Capwell v. Sipe (C. C.), 51 Fed. 667, affirmed 59 Fed. 970, 8 C. C. A. 419. See, also, Hollings-

worth v. Barbour, 4 Pet., at p. 476, 7 L. Ed. 922. If the allegations of the complaint in this case are true, there was no service whatsoever, and the judgment, though not void on its face, is void in fact; and plaintiffs' only adequate protection lies in this action. *That it did not act upon the information acquired from Pellegrin was not neglect, was not 'sleeping on its rights'; it was inaction in reliance upon its legal rights, in reliance upon the constitutional guaranty of due process of law. Such is not the inaction which bars relief in equity.* To accomplish such a bar, it is said that the inaction must be such as amounts to a 'violation of positive legal duty'. Pomeroy's Equity Jurisprudence, 2d ed., Sec. 856, 1187."

Wilmer v. Pica, 118 Md. at 550: Speaking of a case of service upon defendant's daughter, the court said:

"It does not matter that she may have been informed by her daughter of the nature of the proceeding."

Caldwell v. Glenn, 6 Rob. (La.) 9: The citation in this case had been ineffectually served and the court said:

"Knowledge of the suit on the part of the defendant, no matter how clearly brought home to him, will not supply the want of citation."

Osborne & Co. v. Columbia etc. Corporation, 38 Pac. 160, 161 (Wash.):

"Two other reasons are suggested why the order of the lower court should be reversed; One is that the defendant had knowledge of the

pendency of the suit and that such knowledge should be given the same force as proper service. But we are aware of no rule which compels a defendant to appear in a case until service has been made, requiring such appearance."

Harrell v. Mexican Cattle Co., 73 Texas, at 615: In this case the writ was served on one Swinney as secretary of defendant corporation. He was not elected to the office until three days after service and it was held that the service was void. The court said:

"The third and fourth propositions submit that the evidence showed that the officers of the appellee corporation had actual notice of the issue of the writ of garnishment or at least knowledge of such facts as should affect them with constructive notice. We are of the opinion that these propositions are based upon a misapprehension of the law of the case. In ordinary actions courts acquire jurisdiction over the persons of defendants so as to render binding judgments against them by the service of process in the manner provided by law. Service may be waived by express stipulation in writing or by the voluntary appearance of the party either in person or by attorney. But we know of no authority for holding in any case that actual knowledge of the existence of a suit or the issue of a writ will supply the want of service. A defendant may know that a suit has been brought against him, yet he is not bound to take action until he has been duly served with process. He may justly conclude that the court will see that he has been duly cited before acting, and hence is not presumed to know of a judgment

that has been rendered against him without jurisdiction."

Bradley Mfg. Co. v. Burrhus, 135 Ia. 324. This case arose under a statute providing for service by leaving copy at residence, etc. The copy was left with the defendant's wife, and with respect to the impeachment of the officer's return, the court said:

"It need only be said that, as the statute prescribes the method of bringing a party into the court, it can be done in no other way; and the cases are uniform to the effect that his knowledge otherwise acquired, of the pendency of the proceedings, is matter of no moment. He is not chargeable until he becomes a party, and he can be made a party only by proper service of notice or by voluntary appearance."

Savings Bank v. Authier, 52 Minn. 98: The defendant was E. J. Daly. The writ was served on John E. Daily, *who mailed it to the defendant* with a letter of explanation and *the same was received by the defendant* several days before judgment entered. The court said:

"The facts as to service being as above stated, it is perfectly useless to try to sustain the judgment, or to oppose the order setting it aside. The transmission of the summons by mail was wholly unauthorized by law as a mode of service, and of no more effect, although the defendant received it, than would have been his finding it in the street if it had been lost. The statute not only prescribes that service shall be made by delivering a copy thereof to the defendant personally (spe-

cial provision being, however, made for a different mode of service at the house of his usual abode) but it in terms declares that the provision with reference to the service by mail of notices and other papers in actions shall not apply to the service of a summons.

The judgment being void for want of jurisdiction, the respondent was entitled to have it set aside, even though he made no showing of a meritorious defense."

Wilcke v. Duross, 144 Mich. 243; Syllabus:

"Where, in a suit in Justice's Court, process was by mistake served upon defendant's daughter of the same name, instead of upon defendant, and defendant did not appear, the judgment founded thereon is void, and is properly set aside in chancery, *though defendant knew of the mistaken service on the day it was made and was kept advised by counsel of the progress of the case.*" (Italics ours.)

O'Connell v. Gallagher, 104 N. Y. App. Div. 492; In this case the process server thought that he was serving the defendant Gallagher but he served another person, who let it drop to the floor and a servant of the defendant found it and delivered it to the defendant. The court said:

"The fact that the summons and complaint is found upon the floor of a house, or in the street by a defendant in an action, or is delivered to a defendant in the action by one so finding it, is not the service that the Code of Civil Procedure requires, and defendant is under no obligation

to appear and answer because a copy of the summons in an action in which she is named as a defendant comes incidentally into her possession when there is no delivery of the summons as a service upon her. *Under such circumstances the defendant was justified in waiting until the judgment was sought to be enforced. The question of laches, therefore, cannot be considered, as the defendant had the legal right to have this judgment set aside at any time upon it appearing that it had been entered without actual service of the summons* * * *." (Italics ours.)

Kochman v. O'Neill, 202 Ill. 110: In this case service of summons was made by reading it to the defendant's daughter, the statute apparently permitting of service upon the defendant by reading to him. The daughter told her mother about the incident the same evening of the attempted service but the court held the service void.

Counsel's attempted distinction of these cases by pointing out differences in the facts in no wise impairs the principle there recognized and applied; namely, that knowledge is not notice and that notice is an essential requisite of due process.

We recognize that there are numerous state decisions, such as those cited by appellant, which hold to the contrary; but we shall not endeavor to review them, for the result would be merely a showing that there are two divergent lines of reasoning on the subject and that the state authorities upon which appellant relies are not binding in this court, because they fail

to take into consideration the basic constitutional principle involved in the decision of the point.

The case of Mass. etc. Assn v. Lohmiller, 74 Fed. 23 (C. C. A. 7th Cir.), cited by appellant, uses broad language which must, however, be construed in the light of the question there decided; namely, whether a court of equity would grant relief against a default judgment without a showing on the part of the plaintiff that he had a meritorious defense to the action and had not been guilty of laches. The question was acutally decided upon grounds peculiar to bills in equity. Moreover, as shown by the quotation from the National Metal Company case, *supra*:

> "The association was engaged in business in the state and actual service had been made upon resident agents of the association, professedly under a general statute authorizing such service. The fact of agency was not disputed, but that a different agent should have been served was contended."

The case of Cowden v. Wild Goose etc. Co., 199 Fed. 561, 565, merely held that the defendant in the action was estopped by knowledge and acquiescence to deny the actual authority of one who had appeared in and conducted the action on behalf of the defendant.

Martin v. Gray, 142 U. S. 236, likewise proceeded upon grounds peculiar to an action in equity and relief was denied because of the laches of the complainant, who, after the sale under the foreclosure judgment which he sought to attack, had with knowledge permitted the purchaser to take possession and for eleven

years enjoy the same, there being no excuse given for the delay.

These cases in no wise impinge upon the doctrine which is so aptly stated in the National Metal Company case, *supra,* as follows:

> "Jurisdiction can be acquired, if one does not submit himself to it, in no other way than by acutal notice or by constructive notice. Actual notice is given only by personal service of process; constructive notice, by some form of substituted service. * * * But where there is no service there is no notice, irrespective of any knowledge which the defendant may acquire informally, notice is given only by service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge upon notice or to force him into court to defend himself."

The decisions which purport to work out jurisdiction through the existence of actual knowledge ignore utterly the constitutional principle enunciated in such cases as Mexican Cent. R. Co. v. Pinkney and other cases cited, *supra.*

No Waiver of Statute of Limitations Necessary.

Counsel's contention that a grave wrong is being perpetrated by Judge James' ruling because it will raise the bar of the statute of limitations between the plaintiff and the defendant Thomason is just another cry of "wolf." It is well established that Federal equity courts apply state statutes of limitation only to the

extent that equity is thereby accomplished and not where injustice will be the result.

1 Foster's Federal Practice, Sec. 181, pp. 1050, 1051;

Kirby v. Lake Shore etc. R. R. Co., 120 U S. 130; 30 L. Ed. 569, 572;

Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 206.

An equity action is commenced, so as to toll the statute of limitations, upon the filing of the bill, provided, however, that a subpoena is procured and reasonably diligent effort made to effect service in the manner prescribed by law. Unless such reasonable effort is made, the mere filing of the bill will not interrupt the statute. U. S. v. American Lumber Co., 85 Fed. 827, (9 C. C. A.); U S. v Miller, 164 Fed. 444 (Dist. Ct. Ore.).

If any limitation has intervened between the plaintiff's alleged cause of action and a recovery against defendant Thomason, it has been due to the fatuous reliance of plaintiff ever since October 4, 1923, upon the proposition that the marshal's return, however false or fallacious, could not be disputed (Tr. p. 267). Under such circumstances, plaintiff cannot complain. Particularly is this true when the conduct of Thomason, which counsel would have held inequitable, is on an even par with the conduct which, as we have shown, lies at the very base and inception of this whole equity proceeding.

No offer to Defend Is Necessary.

The rule of "modified conclusiveness" for which appellant contends is nothing more or less than a request for a ruling to the effect that one who would challenge the jurisdiction over the person must, in the same breath, hazard his whole cause upon the decision of the trial judge, and if that decision be against him, enter a general appearance. In other words, a conversion of the special appearance into what is in effect a general appearance.

This court endeavored to accomplish the very thing for which appellant now contends, when it adopted Rule 22 providing that in case of special appearance the notice thereof should state "that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in the case within the time allowed therefor by law, or by the order of court or by stipulation of the parties. If such statement be not made as above provided, the appearance shall be deemed and treated as a general appearance."

The Supreme Court, in the case of Davidson Bros. Marble Co. v. U. S. ex. rel. Gibson, 213 U. S. 10; 53 L. Ed. 675 held this rule invalid because in excess of the court's power, saying in part:

> "It says to him, you may appear specially and object to the jursidiction, only upon the condition that you will abide by the decision of a single judge; if that is against you, you must waive your objection and enter a general appearance; if you do not agree to do this, your special appearance

will be deemed to be general. *We think it was beyond the power of the circuit court to make and enforce a rule which imposes upon defendants such conditions, and transforms an objection to the jurisdiction into a waiver of the objection itself.* The jurisdiction of the circuit court is fixed by statute. In certain cases a defendant may waive an objection to the jurisdiction over his person. But he cannot be compelled to waive the objection if he chooses seasonably to insist upon it, and any rule of court which seeks to compel a waiver is unauthorized by law and invalid. So it has been held that, under the act which requires the practice in the courts of the United States to conform as near as may be to the practice of the courts of the states in which they are held, state statutes which give a special appearance to challenge the jurisdiction the force and effect of a general appearance must not be followed by the courts of the United States. Southern P. Co. v. Denton, 146 U. S. 202, 36 L. Ed. 943, 13 Sup. Ct. Rep. 44; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. Ed. 699, 13 Sup. Ct. Rep. 859; Galveston H. & S. A. R. Co. v. Gonzales, 151 U. S. 496; 38 L. Ed. 248, 14 Sup. Ct. Rep. 401. The reasoning in these cases is pertinent to the case at bar.

To sum up, the circuit court for the northern district of California had no jurisdiction to entertain this suit against these defendants, who are not inhabitants of that district, but, on the contrary, inhabitants of the state of Illinois. The defendants appeared specially, as they had a right to do,—solely for the purpose of objecting to the jurisdiction. *They were not bound to agree to*

submit their objection to the final decision of the judge of the circuit court, and the rule of court which treated the special appearance, without such an agreement, as a general appearance, was invalid." (Italics ours.)

To same effect, see:

Bacon v. Federal Reserve Bank, 289 Fed. 513, 515.

If the so-called "modified rule of conclusiveness" be now declared by the decision of this case, the effect will be to say to future litigants, situated as was Thomason: "You may appear specially for the purpose of moving to quash service of summons because the requisites of due process of law have not been complied with, but in order that you may have the benefit of your constitutional guaranties, you must agree in advance to abide by the decision of the trial judge, and if his decision is against you, you must appear generally in the action, you must waive the statute of limitations and must show that you have had no knowledge of the pendency of the action." This, we submit, is directly in the teeth of the Davidson Bros. decision, *supra*. The rule for which counsel contend could not be made a rule of court because of lack of power in the court. Certainly it cannot be made a rule of decision in the face of the reasoning of the Davidson case, or in the face of the reasoning of the other Supreme Court cases which we have cited, to the effect that formal legal notice is essential to the existence of due process of law.

Point III.

THE EVIDENCE IS SUFFICIENT TO REBUT THE MARSHAL'S RETURN AND AFFIDAVIT.

Copy of Writ Was Delivered to Rosamond.

So far as the returns filed prior to the making of the motion to quash are concerned, they are conclusively and effectually impeached by the affidavits and birth record showing the minority of Rosamond Thomason. Referring to the amendment presented during the pendency of the motion, it must be remembered that the amendment was, before its filing, shown by the evidence and found by the court to be untrue. At the time of the making of the order for its filing and of its delivery to the clerk, it had already been shorn of any actual or presumptive verity. We think it is a fair inference that Judge James merely permitted the same to be filed as a matter of form, for he expressly found the facts the other way. Certainly, under these circumstances, no *prima facie* case is made by the amendment.

Counsel apparently concede that the amended return and the Walton affidavit are to be read together in determining the question of where the preponderance of the evidence lay. They have, however, overlooked these salient facts: that the return shows on its face that the deputy did not know whom he had served, and that his supporting affidavit clearly demonstrates that the other material statements of the return were made wholly upon hearsay evidence given by an unidentified person. The return states positively that the

person so served was a member of the family of Thomason and a resident in that family, also that said person was an adult. Reference to the affidavit shows that the deputy could not possibly have known any of these facts so certified by him, except upon the strength of the statements alleged to have been made by the person with whom he conversed at Thomason's home. He does not know and does not purport to say who that was, except that he claims that that person told him that she was a married daughter, etc. The documents upon which appellant relies show affirmatively that the return is made upon hearsay, pure and simple.

Opposed to this are the affidavits of Mrs. Thomason and her four daughters. Those affidavits establish, as a matter of personal knowledge of the respective affiants, that at the time of the attempted service Jasper Thomason was in Kern county; that his wife was with him; that they were at the home of their daughter Gladys; that the daughter Verna, who then resided in San Pedro, was not present at the defendant's home on the occasion in question; that Meryle T. Davis, though visiting at said home, was absent at the time and that the deputy conversed with Rosamond and left the papers in her presence. This was the version of the transaction which was adopted by Judge James. And the original return clearly demonstrates that the deputy marshal did not understand that he had delivered the writ to Meryle. Before filing, he struck her name out of the return. (See stipulation for diminution.)

This Court Revises Only Palpable Errors in Findings of Fact.

Counsel seek to have this finding of fact overthrown through an exercise of the power of an equity court to re-examine the facts upon appeal. The existence of power may be granted; but that does not concede the propriety of its exercise in every case. In U. S. v. Marshall, 210 Fed. 595 (8 C. C. A.) the court said:

> "To secure a reversal upon such a basis as that just mentioned the *appellant must convince us not only that the trial court may have been wrong, but that it was manifestly wrong.* There must, under the holdings of this court, have been *an 'obvious error' of law or a 'serious mistake' in dealing with the facts.* (Citing cases.) The error must be 'clear and palpable'. Babcak v. De Mott, 160 Fed. 882, 88 C. C. A. 64. *The conclusion of the trial court is 'presumptively right'.* State of Iowa v. Carr, *supra.* Some distinction relieving from this rule is claimed in the present case because the testimony was not taken before the judge but before an examiner, and it is said that under such circumstances this court is in as favorable a situation to deal with the matter as was the court below. United States v. Booth Kelly Lumber Co., 203 Fed. 423, 121 C. C. A. 533, from the Ninth Circuit, is cited to this point. But the question is not so much one of situation to decide as of where the law places the primary determination of questions of fact. While no doubt the circumstance that the district judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusion—a consideration mentioned by this court in Coder v. McPherson, 152 Fed. 951, 953, 82 C. C.

A. 99, also in Harper v. Taylor, 193 Fed. 944, 113 C. C. A. 572, by the Circuit Court of Appeals for the Sixth Circuit in Mt. Vernon Co. v. Wolf Co., 188 Fed. 164, 110 C. C. A. 200, and by the Circuit Court of Appeals for the Ninth Circuit in The Santa Rita, 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210—*the fact that he did not hear such witnesses, but that the proofs before him were entirely by deposition or upon examiner's report, does not destroy the presumption.* Such still exists in favor of his conclusion. *To hold otherwise would in effect be to make this the court of first instance.* The District Court is not in such matters a mere conduit. It, not this court, is the trial court. *Our functions are simply to guard against manifest error on its part, and this is true whether such arises upon hearing witnesses or upon reading a record."* (Italics ours.)

In Schlafly v. U. S., 4 F. (2d) 195, 198, the same court said:

"At the outset we are confronted with the well-settled rule that, in a proceeding in equity,—and this must be treated as such—the findings of the chancellor on disputed evidence have not the conclusive effect as the findings of a jury, or of the trial judge when a jury has been waived, in an action at law; but *unless it is clearly against the weight of the evidence,* or based on a mistaken view of the law, it will not be disturbed by an appellate court, especially if the finding has been made by a master, or in a bankruptcy proceeding by the referee, and approved by the court on a petition for review. * * * But it is claimed that this rule does not apply to the instant case, as the hearing before the referee was on deposi-

tions entirely, and he had no better opportunity to determine the credibility of the witnesses than this court has.

Prior to the promulgation of the present equity rules, the evidence in equity cases was entirely on depositions, yet the same rule of law was followed by the Supreme Court and all other national appellate courts.

In Newell v. Norton, 70 U. S. (3 Wall.) 257, 267 (18 L. Ed. 271), which was an admiralty case, in which the entire evidence was on depositions, it was held: 'It is enough to say that we find ample testimony to support the decision, if believed; and that we again repeat, what we have often before decided, that in such case *parties should not appeal to this court with any expectation that we will reverse the decision of the courts below, because counsel can find in the mass of conflicting testimony enough to support the allegations of the appellant. * * * Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony.'* And this court has uniformly so held. ** * * The error must be palpable to justify it.*" (Italics ours.)

In an effort to destroy the effect of the evidence submitted on behalf of defendant, counsel call attention to certain alleged contradictions in the affidavits of Rosamond. They say that because she stated in her affidavit of April 7 that Walton "delivered to her" a copy of the subpoena, and in her later affidavit of April 26 that he threw the same on the porch in her presence, she

has sworn falsely. The first affidavit was made in support of the original application to vacate. No occasion presented itself for drawing a distinction between physical and legal delivery of a copy. The last affidavit detailed the facts for the purpose of showing the inaccuracy and falsity of the Walton affidavit. No point has been raised at any time to the effect that the service in the manner made by the marshal was not good if he made it upon a person whom he was entitled to serve.

Counsel point to the fact that in her second affidavit Rosamond said that she told the marshal her father would probably be at home soon, and in the third one that she told him her father was at the time in Antelope Valley. We see no confiict here.

Counsel contrast the Meryle T. Davis affidavits with those of Mr. Walton and Mr. Lewinson. Their respective statements relative to the alleged evasion of process have been already considered and the attenuated nature of their swearing disclosed. The only other attack they make on the Meryle Davis affidavit is the claim that she had been found guilty elsewhere (when not brought in as a party) of certain false swearing. Be that as it may, Judge James was as well qualified to pass upon her veracity as was Judge Bledsoe, and the fact that Judge Bledsoe may have found her testimony false in any respect—(whether he did or did not we do not know)—would by no means conclude Judge James or this court.

In view of the above quoted authorities, we submit that there is no basis whatever for the claim that

Judge James' ruling is not amply supported by the evidence.

Oral Hearing Not Proper Procedure.

Counsel complain loudly of the refusal of the court to order an oral hearing upon the motion so that they (counsel) might exhibit their skill in cross-examination. In the first place, the practice which they claim should have been followed is out of line with the established procedure. The well nigh uniform practice is to present and dispose of such motions upon affidavits only.

Mechanical Appliance Company v. Castleman, 215 U. S. 437; 54 L. Ed. 272;

Higham v. Iowa etc. Association, 183 Fed. at 847;

Peper Automobile Co. v. American Motor Sales Co., 18 Fed. 245;

American Cereal Co. v. Ely Pettijohn Cereal Co., 70 Fed. 398;

Wall v. C. & O. Ry. Co., 95 Fed. 398;

Benton v. McIntosh, 96 Fed. 132.

Counsel assert that the adherence to the settled practice in this case was in effect a concession to the fears of the Thomason family. They insinuate that Thomason was not in the physical condition which would prevent his examination or making of affidavits. The showing of Drs. Mortensen and Brainerd, wholly disinterested witnesses, corroborates fully the affidavits of the members of Thomason's family to the effect that his condition absolutely forbade any further participa-

tion in the proceding. There is nothing whatever in the record to show any reluctance on the part of any of the witnesses to submit to cross-examination. This is merely a figment of counsel's imagination. Thomason's solicitors were conducting the proceeding,—not his relatives. They were neither asked to testify orally, nor did they object thereto.

Thomason's solicitors merely directed the court's attention to the fact that plaintiff's requests for oral examination were directed toward a false issue in the case; namely, defendant's actual knowledge of the suit or his actual receipt of a copy of the subpoena [see Tr. pp. 243, 250, 251, 315, 212]. The authorities above cited clearly show that knowledge or lack of knowledge is of no consequence in the absence of notice given in the method prescribed by law.

Service on Married Daughter Not Compliance With Rule 13.

If counsel had been permitted a cross-examination of the witnesses and had succeeded in developing the facts which he now claims; *i. e.,* that the service was made by delivering a copy to a married daughter, he would be hoist on his own petard; such a showing would prove a service other than that authorized by equity rule 13, because it would show that the person served was not a member of the family of defendant Thomason.

Mrs. Thomason, Rosamond and Mrs. Harris affirmatively state that the only persons residing in the home of Thomason on the date in question were the

defendant, his wife and his daughter Rosamond [Tr. pp. 298, 305, 308]. It was likewise conclusively established that all of the daughters except Rosamond were at the time married and had ceased to become a part of their father's household. One lived in Antelope Valley and one in San Pedro. The residence of Meryle T. Davis is not definitely fixed, but it does affirmatively appear that she was not residing in her father's home [Tr. pp. 302, 261].

The equity rule provides that substituted service may be made by leaving a copy with an adult person "who is a member of or resident in the family". It is clear, as a matter of law, that these married daughters who constituted a part of the family of their respective husbands, had, for the purposes of the rule, ceased to be members of the family of defendant Thomason. That word, as used in statutes providing for substituted service, does not apply to married daughters who are living in their own separate homes.

In Heineman v. Pier, 85 N. W. 646 (Wis.), the statute authorized service "by leaving a copy thereof at his usual place of abode in the presence of someone of the family of suitable age and discretion". The return showed service "at her home, No. 577 Van Buren street, in the city of Milwaukee, which is her usual place of abode, by delivering to and leaving with her daughter, Mrs. Jno. H. Roemer, a member of the family of said defendant, who resides with her, being a person of suitable age and discretion, a true and correct copy thereof". A motion to quash service was denied by the lower court and a motion to vacate the

judgment was likewise denied. In reversing the case, the Supreme Court said:

> "It seems very plain that there was no legal service of the summons in this case, and that the pretended service should have been set aside. * * * Statutes dispensing with actual personal service of process must be strictly pursued. Pollard v. Wegener, 13 Wis. 569. It is imperative that the summons be delivered to a member of the family to which defendant belongs. In this case it was delivered to defendant's married daughter, who resided, with her husband, in the same house or building with defendant, but in separate apartments; the two households being managed separately, each paying their own expenses and employing their own separate servants. Families may be separate though living under the same roof. * * * In order to constitute a family, the persons composing it must be under one management or head. Poor v. Insurance Company (C. C.), 2 Fed. 432 * * *. The defect being jurisdictional, she was not required to show merits."

In Colter v. Luke, 108 S. W. 608 (Mo. App.), the court was construing a statute providing for service by leaving a copy "with some person of his family". The decision says:

> "The word 'family' as used in the statute may be defined as 'a collective body of persons who live in one house, under one head or manager, including parents, children and servants, and, as the case may be, lodgers or boarders'. * * * In speaking of the persons of a family, the words

'person' and 'member' are synonomous, and may be used interchangeably."

In Poor v. Hudson Co., 2 Fed. 432, 438, the court said:

"The most comprehensive definition of a family is 'a number of persons who live in one house and under one management or head'. There is no specific number required to constitute a family; but they must live together in one house and under one head. * * * The precise question is, were they living there together, under one head or management? This is one of fact and not of law."

25 Cor. Juris. 664:

"* * * unless the context manifests a different intention, the word 'family' is usually construed in its primary sense. * * * In its ordinary and primary sense, the term signifies the collective body of persons living in one house, or under one head or manager; a collective body of persons, consisting of parents or children, or other relatives, domestics, or servants, residing together in one house or upon the same premises; a collective body of persons living together in one house or within the curtilage; a collective body of persons who form one household under one head and one domestic government; those who live under the same roof with the pater familias, who forms his fireside. * * *"

See, also:

Jackson v. Smith, 200 Pac. 542 (Okla.).

It seems clearly apparent that if the court had concluded that service had been made on Meryle T. Davis

or any of the married daughters of Thomason, it would likewise have granted the motion to quash for lack of compliance with equity rule 13, in that there had been no delivery of copy to a member of the family of the defendant.

Point IV.

Rosamond Thomason Was Not An Adult Person Within the Purview of Equity Rule 13.

"Adult Person" Means One of Full Legal Age.

1 Street's Fed. Eq. Prac., Sec. 595, page 371, commenting upon the decision in the Von Roy case, *supra*, says:

> "The fact was not observed upon that the return also failed to show that the copy was left with an adult, though this was doubtless a fatal defect. In our law, a person is not an adult in either legal or common acceptance until he is of full legal age. In the civil law a male is adult at fourteen."

Bouvier's Law Dictionary says:

> "Adult. * * * In Common Law. One of the full age of twenty-one."

In Banco de Sonora v. Bankers' Mut. Cas. Co., 100 N. W. 532, 535 (Iowa), the court was construing the phrase "two adults" as used in an insurance policy requiring the packing of certain articles by two adults before delivering to the carrier. The court quoted Blackstone as follows:

> "So that full age in male or female is 21 years, which age is completed on the day preceding the anniversary of a person's birth, who till that time

> is an infant, and so styled in law," and then said: "Thereafter they are adults. And this is the conclusion of the lexicographers and the courts generally concerning the term in its legal acceptation."

In Schenault v. State, 10 Tex. App. 410, 411, the court said:

> "The word 'adult' seems to have a well defined meaning both in law and in common acceptation. Mr. Bouvier defines the meaning of the word as used in the civil law, with which we have no present concern, and says: 'In the common law, an adult is considered one of full age.' Mr. Wharton defines the word as signifying 'a person of full age.' Mr. Webster gives as one of the meanings: 'One who has reached the years of manhood.' In Raven v. Waite, 1 Swanston's, Ch. L. 533, 36 Reprint 502, cited by Mr. Bouvier, the term 'adult' and the phrase 'having arrived at the age of twenty-one years' appear to be used interchangeably."

See, also:

1 Cor. Juris. page 1403.

Opposed to this array of authorities is counsel's *ipse dixit* that "adult" has a different meaning when used as an adjective from its commonly accepted meaning when used as a noun. The definitions in Webster's Dictionary, to which reference is made, support no such conclusion. Nor is there any reason for assuming that the Supreme Court used the phrase "adult person" in any other than its ordinary acceptance. It must be remembered that the rule was not addressed to a school of sophists, but was designed for the prac-

tical use of members of the bar and officers of the court; that it was therefore intended to be accepted with the meaning commonly understood in the legal profession—a person of full age. Of course one is not of full age under the common law rule until having arrived at twenty-one years, or, under the California Code rule, in the case of a woman, until having attained the age of eighteen years (Cal. C. C., Secs. 25, 26 and 27).

The reason for the Supreme Court's use of the word "adult" as an adjective is readily apparent. As the rule stood prior to its revision of 1866, it was provided that a copy could be left "with some free white person, who is a member or resident in the family" (17 Peters, lxiii). By the amendment of 1866, the word "adult" was substituted for the words "free white" and, in other respects, the language of the rule which we have just quoted remained the same.

The degree of counsel's conviction as to the merits of this argument is discolsed by their discussion of the conflict between the affidavits of Rosamond Thomason Hunt and Mr. Walton. Walton's return in every instance says that the copy was left with an adult person. Rosamond's affidavit states that she told Walton that she was but seventeen years of age. Hence, say counsel: "Rosamond accuses the marshal * * * of making with knowledge a deliberate *false return.*" (Appellant's Brief, page 16.) The marshal's returning service upon an *adult person* in the light of information to the effect that she was but seventeen years of

age is also characterized as a false return at pages 26 and 86 of the brief.

Counsel's argument as to the meaning of "adult person" is predicated largely upon the assumption that the rule was intended as a convenience to the marshal rather than as a means of insuring actual delivery of the process to the person for whom it is intended. They say that it is easier for the marshal to ascertain physical and mental development than it is age or non-age, and that therefore the rule should be construed so as to permit a marshal to determine for himself whether the person to whom process is handed is sufficiently mature to come within the term "adult", and, having so determined, to make a written return which states the fact of service upon an adult person and forever precludes a defendant from disputing the return. Of course the obvious purpose of the rule, as in the case of all statutes or rules providing for constructive or substituted service, is to provide some reasonable method of service which will, as a practical means, accomplish the delivery of the notice to the defendant. It is for the law making power (in this instance, acting through the Supreme Court in formulating rules), to determine what is the reasonable method of giving such notice and to prescribe such notice as, in its judgment, reasonably constitutes adequate and certain notice. Within constitutional limits, that discretion is uncontrolled. But when the law making power has once acted in the premises and has prescribed the form or manner of service of process, that form and that manner must be scrupulously observed, or the service

goes for naught. It will not do in such instances to say that some other method has been pursued which gives just as full and just as certain notice. If the statutory method has not been followed, the service is utterly void. (Settlemier v. Sullivan, *supra;* Harris v. Hardemann, *et al., supra;* King v. Davis, *supra;* Mexican Cent. R. Co. v. Pinkney, *supra.*)

Through Equity Rule 13, the Supreme Court has in substance said that the person to whom process is delivered must be of full age, and it will not do to say that she looked or talked like she was of full age. It is necessary that she be of full age; otherwise there is no service.

No Showing That Rosamond Was an Adult Within Appellant's Definition.

Even if counsel's contention as to the correct construction of the phrase "adult person" were to be adopted, the record before the court would not warrant a holding of service upon an adult person. This, for the reason that there are no presumptions in favor of the return (Harris v. Hardemann, *supra;* Blythe v. Hinckley, *supra*), and it is incumbent upon the officer to affirmatively show in his return compliance with all of the requisites of the rule. For instance, in King v. Davis, *supra,* the return was held bad because it did not state that the wife was a member of the defendant's family; in Blythe v. Hinckley, *supra,* it was intimated that the return was had because it did not state that the person to whom delivery was made was a member of defendant's family, and in Harris v. Harde-

mann, *supra,* because it did not state that the defendant could not be located. In other words, the burden is upon the plaintiff in this case to show that in fact Rosamond Thomason was an adult person within the meaning of that term as defined by its counsel. It appears without contradiction that she was but seventeen years and five months of age. Therefore, in order for plaintiff to succeed, under its own definition, it must show affirmatively that mentally and physically Rosamond had attained that degree of perfection which counsel denominate as maturity. Their affidavits are absolutely silent on the subject and they must, in any event, fail in their argument that service was made upon an adult person.

Point V.

DEFENDANT'S OPPOSITION TO THE MOTION TO AMEND RETURN OF SERVICE DID NOT WORK A GENERAL APPEARANCE.

Appellant's Argument Denies Any Substantial Efficacy to Special Appearance.

The argument of appellant really comes down to the proposition that defendant, in opposing the motion to amend the return, entered a general appearance by inadvertence. The claim is that by taking such steps as were necessary to frustrate plaintiff's effort to defeat the motion to quash, the defendant waived his special appearance, and hence his motion, and *nolens volens* submitted himself completely to the jurisdiction of the court. This contention is made notwithstanding the fact that it is plain on the face of the record that

the brief and affidavits, submitted by Thomason in opposition to the motion to amend, were largely instrumental in procuring the ultimate denial of the motion because they convinced the trial court of the falsity of the facts upon which the proposed amendment was predicated, and of the sham nature of the amendment itself, and caused the court to make a ruling which permitted only the *pro forma* filing of the amendment at the same moment that he found the same to be untrue. Counsel's position is that, though silence on Thomason's part would have resulted in a return showing service upon an entirely different person than the one mentioned in the Thomason motion and affidavits and although that return would have been based upon an undisputed affidavit of Walton, nevertheless Thomason could not disclose the sham nature of the proceeding without irrevocably waiving the point that the court had no jurisdiction over him; in other words, that in order to preserve his special appearance, he must stand by and watch a falsification of the record and a denial of his motion without raising a word of protest. According to counsel's contention, there was no remedy at all for Thomason under the circumstances. If he moved, his motion had to be denied; if he sat silent, a record would be made against him which would necessitate the denial of his motion. In other words, according to counsel's contention, if an erstwhile deputy has a sufficiently elastic conscience, he can create jurisdiction where none existed and can do so with impunity, for no one dares question the accuracy of his affidavits or dares swear

to any other facts. Such a rule is exceedingly illogical and unjust.

Certainly the logical rule would be one which permits the defendant appearing specially to do anything and everything which may be necessary to make his special appearance and motion good. Otherwise, a special appearance is of no value whatever and one must always concede jurisdiction of the person in order to attack want of jurisdiction.

The Facts Pertaining to Alleged General Appearance.

The affidavit of Jasper Thomason [Tr. p. 154], attached to his motion to quash service of subpoena, specifically limited the authority of his solicitors to "the sole purpose of moving this court to quash service of subpoena herein and vacate and set aside the order *pro confesso* made herein on October 12, 1923, and to vacate and set aside as to this defendant the "Final Decree" entered herein on the 24th day of March, 1925, upon the ground that the said court has not and at no time has had jurisdiction over the person of this affiant."

The praecipe for entry of special appearance [Tr. p. 233], filed with the clerk on April 15th, is limited in substantially the same language, and concludes as follows:

"The said defendant does not appear generally in the said cause, but makes a special appearance only for the purpose of contesting the jurisdiction of the court over his person."

After that motion had been argued and submitted to the court, the plaintiff, being apparently persuaded of the right of Thomason to impeach the marshal's return, served upon Thomason's solicitors so appearing specially a copy of his application to amend marshal's return and accompanying papers [Tr. pp. 270, 272, 274]. It is true that the application was not made upon notice, but obviously the service was made upon solicitors for Thomason upon the theory that the amendment was but a step in the consideration or determination of the motion to quash service.

The memorandum and affidavits filed on behalf of Thomason in opposition to the motion to amend were filed upon the theory that the proposed amendment was offered in opposition to Thomason's motion and as a means of defeating the same. The memorandum [Tr. p. 279] upon which counsel lay so much stress shows clearly that such was the idea of counsel for Thomason [pages 280, 281, 291, 292]. It concludes as follows:

"But if the court should not agree with us on this we then respectfully submit that upon a consideration of all of the affidavits and other papers on file which are pertinent to this motion the court cannot fairly arrive at any other conclusion than the ultimate fact that the attempted service was made with respect to Rosamond Thomason and that she was a minor at the said time and the service, therefore, void."

The reply brief of plaintiff [Tr. p. 314] shows that counsel for plaintiff at that time had the same understanding, for point 1 thereof is this:

"That the affidavit of the marshal sufficiently supports the service without the necessity of further order of court and *necessitates denying said defendant's motion heretofore made to set aside the return.*" (Italics ours.)

Point 3 is:

"Assuming the positions taken by us in opposition to said defendant's motion to quash are unsound (which we deny), the question resolves itself into a conflict between the affidavits of the marshal and the daughters of Jasper Thomason."

In their brief in this court, counsel for appellant virtually concede that in substance the memorandum in question was in furtherance of the motion to vacate; but they insist upon the *form* of the matter as being conclusive in the premises. At page 99 they say:

"In the court below defendant heavily emphasized the point that plaintiff's motion to amend the return was occasioned by defendant's motion to quash, and that the two were argued together; at least somewhat. A fair reading of the record leaves no doubt that this is true, but what of it?"

The court itself understood the nature of the position taken by Thomason's solicitors in the same manner as they, for in the court's opinion and order made May 25, 1925 [Tr. p. 320], it ruled upon the application for leave to amend as a part of the ruling upon the motion to quash; and, after permitting the filing of the supplemental affidavit of the deputy marshal, the court said: "Considering the application then, with all of the matters mentioned present," etc., thus

clearly showing that the court considered the supplemental affidavit of the marshal as but an additional showing in opposition to the Thomason motion to quash.

Upon that state of the record does the objection of Thomason's solicitors to the amendment of the return constitute as a matter of law a waiver of the special appearance upon which they at all times insisted? Every document filed by them in the matter insisted upon the special nature of the appearance.

The very memorandum which appellant urges to have worked a general appearance was signed "Wm. T. Kendrick. Newlin & Ashburn. Solicitors for defendant Jasper Thomason appearing specially herein" [Tr. p. 296]. The affidavits submitted therewith were endorsed with the names of the attorneys as "Solicitors for defendant Jasper Thomason, appearing specially" [Tr. p. 314].

When served with the application for leave to amend the return counsel were placed in this position: Their motion was directed to the service as shown by the returns already on file. A new return, shifting the proof of service to some person other than Rosamond Thomason, would in effect offset all of the proofs which Thomason had theretofore offered in support of his motion to quash. If counsel stood silent they would in effect have consented to the denial of their motion because of the new showing made of service upon some other person. Inasmuch as the proceeding to amend was clearly directed at the defeat of the pending motion, it would seem both illogical and unjust to make

any ruling which would in effect hold as counsel for plaintiff now claim,—that, by resisting this new move of plaintiff, defendant Thomason would waive his own motion, at which plaintiff's new move was directed. In other words, plaintiff would now have the court hold that Thomason could not resist plaintiff's counter-motion, except upon the penalty of waiving his own motion and subjecting himself wholly to the jurisdiction of the court, with the result that a judgment rendered in his absence and without jurisdiction over him should thereby be converted into a valid judgment in opposition to which he could no longer be heard,—and all this because of his insistence that plaintiff could not shift its ground in order to defeat his, Thomason's, pending motion to quash service. Unless there is some controlling authority, we apprehend that the court will not visit any such harsh result upon the bona fide efforts of Thomason to preserve his rights in his pending motion.

Appellant's Authorities Opposed to Federal Rule.

Counsel for plaintiff cite one case (Stubbs v. McGillis, 44 Colo. 138), decided in the state court of Colorado, which appears to be in point; but it is, as we shall show, directly opposed to the great current of Federal authority. The other case upon which plaintiff relies and which is somewhat in point is a Wisconsin case (Bester v. Inter-County Fair, 135 Wis. 339), in which the party who was moving to quash service himself moved the court to amend the return of the officer. The last mentioned case presents one

of those situations where the defendant voluntarily became an actor in the cause and affirmatively sought relief from the court. The court in effect held that such application was inconsistent with the insistence upon a want of jurisdiction over the person. It is extremely doubtful whether the Federal decisions sustain the ruling of the Wisconsin court, for the motion was apparently made in an effort to further and effectuate the plea to the jurisdiction. And the rule in the Federal courts, as developed by the decisions in latter years, is that the question of waiver of special appearance is a question of intent, express or implied, and that unless the act which is invoked as a waiver of the special appearance be of a clear and convincing nature no such waiver will be spelled out by inference.

Federal Rule Is That Waiver of Special Appearance Is Matter of Intent.

The case of Southern Pacific Company v. Arlington Heights Fruit Company, 191 Fed. 101 (C. C. A., 9th Cir.), is clearly in line with this position and at variance with many earlier Federal decisions, upon which plaintiff relies, and with many state decisions, which counsel likewise cite. In this case the defendants filed an appearance which raised, first, the point of jurisdiction over the person, second, a challenge to the power of the court to determine the reasonableness of a railroad rate in advance of a determination of the question by the Interstate Commerce Commission, and, third, an absence of indispensable parties. The court said that the defendants had "in reality combined a

plea to the jurisdiction of the court over the person with a plea to the jurisdiction of the court as a court of equity to determine the cause which is presented by the complainants." It is obvious from other remarks of the court that it considered this "plea to the jurisdiction of the court as a court of equity" as being merely a plea to the subject matter of the action, as it really was. In other words, the point raised was not that the court had no jurisdiction over the subject matter but it was that under the circumstances disclosed by the bill the court as a court of equity, in the exercise of its jurisdiction, should not grant the relief prayed for. At page 110 the court said:

> "Unless it be, therefore, that, by combining a ground of want of jurisdiction over the person *with the objection that the complainants are without equity as shown by their bill,* the defendants have submitted themselves to the territorial jurisdiction of the court, they ought not to be further proceeded against. The case at bar upon principle does not differ materially from the Gibson case. There the motion to quash the summons and to dismiss the action combined the two grounds as distinctly as here, and the demurrers were based upon like grounds, which were also acted upon and overruled by the court, yet it was determined there was no waiver as respects jurisdiction over the person. It would seem to be deducible, therefore, from these authorities from the Supreme Court, including the Gibson case, that when the defendant appears specially for the express purpose of challenging the jurisdiction of the court over the person for want of proper service, or upon the

grounds that the venue is not laid in its judicial district, *although he may have combined in his motion or plea to the jurisdiction matter going to the subject of the suit or action, he does not thereby waive jurisdiction over his person.* The purpose of the defendant is to be gathered rather from the nature of his appearance. If, being special, it is to insist unquestionably upon want of jurisdiction of the court, there would be no waiver. By appearing generally the party submits himself to the jurisdiction of the court for all purposes of which the court can take cognizance. The manner of the appearance would be taken as an indication of the purpose of the pleader to submit to the court's jurisdiction, notwithstanding an objection to the contrary. But, where the appearance is declared in unmistakable language to be special, the pleader's intendment that it is not so is not always to be deduced from the fact of the combination of an objection to the jurisdiction *with an objection to the subject-matter.* Of course, the court cannot pass judgment upon the subject-matter without at the same time having jurisdiction of the person, yet if the defendant insists upon his objection to the jurisdiction over his person, and he is in a position to insist thereon, the court ought to give him the benefit of that objection and pass judgment respecting it." (Italics ours.)

Kelley v. T. L. Smith Co., 196 Fed. 466 (7 C. C. A.), says:

"Appellees T. L. Smith Company and Buckley contend that the alleged error was waived through appellants' having made a general appearance by their demurrer. But when appellants added to

> their challenge of the court's jurisdiction over their persons a further challenge of the court's jurisdiction over the subject-matter, we do not think that they thereby converted their special into a general appearance, abandoned their objections to the service of subpoena and notice, and asked the court to assume jurisdiction and determine the sufficiency of the bill. Clearly the intent was to urge only objections to jurisdiction."

Counsel for plaintiff seek to distinguish the Southern Pacific and Kelley cases upon the theory that in each instance the plea was confined to a challenge to the jurisdiction of the court, the defendant joining a plea to the jurisdiction over the subject-matter with a plea to the jurisdiction over the person. We submit that the discussion of the decisions, particularly the Southern Pacific case, does not warrant this conclusion. This is particularly apparent from the fact that the Southern Pacific decision discusses and distinguishes the cases of Fitzgerald etc. Co. v. Fitzgerald, 137 U. S. 98, and Mahr v. Union Pacific R. Co., 140 Fed. 921, both of which clearly enunciate the rule that a plea to the jurisdiction of the court over the subject-matter constitutes a general appearance. 4 C. J. 1333, says:

> "Broadly stated, any action on the part of a defendant, except to object to the *jurisdiction over his person* which recognizes the case as in court, will constitute a general appearance. Thus a party makes a general appearance by objecting to the jurisdiction of the court over the subject-matter of the action, whether the objection is made by a motion or by formal pleading."

2 R. C. L., page 322, says:

> "A special appearance is one made merely for the purpose of testing the sufficiency of the summons to bring the defendant within the jurisdiction of the court."

The court, in the Southern Pacific Company case, quoted with approval the following language from Harkness v. Hyde, 98 U. S. 476:

> "It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

It appears fairly clear, therefore, that the Southern Pacific case is not to be distinguished upon the ground that the pleas were all directed to the jurisdiction of the court,—primarily, for the reason that the discussion of the case does not warrant this conclusion, and, secondarily, for the reason that the law is well established that a plea to the jurisdiction over the subject-matter constitutes a general appearance. The case holds essentially that joining with a special appearance a plea going to the merits of the case, does not of itself require a holding that the special appearance has been waived and that the result can be reached only when there is something additional and apparent upon the record which is inconsistent with a continued insistence upon the special nature of the appearance.

Sterling Tire Corporation v. Sullivan, 279 Fed. 336, decided by this court and cited by appellant, is not opposed to our contentions. In connection with a pending motion to discharge a receiver, counsel appeared

and, stating to the court that he had authority to represent the Sterling Tire Corporation, he read in open court a telegram authorizing him to act as such attorney and protect the company's interests, and then insisted on behalf of the corporation that the receiver should give a larger bond, and the court ordered that this be done. With respect to the matter of special appearance, this court, after calling attention to the above mentioned facts, said:

> "Counsel did not then ask for entry limiting his appearance, and having obtained what he asked for in the way of an indemnity to his client, is not now in a position to contend that he made a special appearance."

The court also said:

> "Nor do we believe that, when associate counsel for the New Jersey corporation appeared in the later proceeding, the motion of the receiver for instruction and for compensation, counsel's statement that he appeared 'specially' can be held to have been a special appearance. Like the action that had been taken previously by first counsel who appeared, the second appearance was in no way limited to objection to the jurisdiction."

Dahlgren v. Pierce, 263 Fed. 841 (C. C. A., 6th Cir.): In this case the court was discussing the effect of an argument on the merits of the bill, made in connection with a motion to quash, and said:

> "The question of general appearance is one of intent, actual or implied, and *where the whole purpose of defendant's application to the court is to*

set aside an order because it has been made without personal jurisdiction over him, the conduct which will make the motion unavailing and destroy its basis must be clear and unequivocal. It is a matter of everyday experience that, upon the argument of a challenge to the personal jurisdiction, questions upon the merits will collaterally arise. Not uncommonly the court thinks it may not be necessary to decide a difficult question of personal jurisdiction, because there is no good case presented upon the merits, and the court will make the suggestion and desire to hear counsel upon it. Whether argument of this kind comes in response to the court's suggestion, *or comes voluntarily from defendant's counsel by way of good measure in giving reasons why the actual motion should be granted, we think such argument should not be held, of itself and necessarily, a waiver of the objection* which is being so carefully preserved; and, unless there is a rule of law imperatively declaring such a waiver, it ought not to be found from the circumstances of this case." (Italics ours.)

In the later case of Grable v. Killits, 282 Fed. 185, the same court was considering, among other things, the effect of the applicant's applying for and obtaining leave to amend his motion to quash. After quoting from the Dahlgren case to the effect that the question of general appearance is one of intent and that conduct relied upon to work a waiver of a special appearance must be clear and unequivocal, the court said with respect to the point of amending the motion:

"Nor are we able to see that the obtaining (on the hearing of the motion to set aside service) of leave to amend the motion by inserting the name of a defendant not originally included in the notice worked a general appearance. *Such action was directly germane to the motion to set aside service.* Neither this motion, nor the motions to set aside service of the restraining and receivership orders, invoked the jurisdiction of the court upon the merits *or upon any subject inconsistent with the motion under consideration.* If our conclusion as to the effect of the first motion is correct, clearly the subsequent motions to dismiss and the answer upon the merits did not amount to a general appearance. After defendants had done all they could to avoid personal jurisdiction, they were at liberty to present meritorious defenses, and without losing the benefit of the formal motions, so long as they persisted in their protests against personal jurisdiction." (Italics ours.)

Certiorari was denied in this matter; Bacon Bros. v. Grable, 260 U. S. 735; 67 L. Ed. 488.

Appellant's attempt to distinguish the Dahlgren case sticks in the bark. Counsel admit that under that decision an argument addressed to the merits is not a waiver of the special appearance where a defendant confines his request for relief to a prayer that the motion to vacate be granted. They ignore, however, the principle of the decision, which is that a waiver will not be inferred from conduct which is coupled with an insistence upon the special appearance and is not necessarily inconsistent with such adherence to a challenge to the jurisdiction over the person. In the

memorandum submitted by Thomason in opposition to the motion to amend the concluding phrase was substantially the equivalent of the phrase which is quoted in the Dahlgren decision and which is held to show a continued insistence upon the special appearance. This reduces counsel's argument on the Dahlgren case to the point that our objection to the amendment is a distinguishing feature, because we thereby invoked the discretion of the court and that that could not be done without admitting jurisdiction over the person. The Grable decision, *supra,* seems to fully answer this contention; for it was there held that the invoking of the court's discretion to the extent of procuring leave to amend the motion to quash did not concede jurisdiction over the person or waive the special appearance. Yet, such application for leave to amend just as clearly invoked judicial discretion as does an objection to a proceeding which is professedly designed to defeat the pending motion.

Garvey v. Compania, etc., 222 Fed. 732 (Dist. Ct. Tex.), likewise constitutes a complete answer to this contention, for it is there held that the invoking of the processes of the court to the extent of taking depositions in support of the motion to quash does not waive a special appearance. The theory of the decision is that the invoking of the court's process was a proceeding consistent with and designed to further the motion to quash. The language of the court was:

> "The depositions were taken and offered, and the notice to plaintiff of the taking of the depositions so stated, only in support of the motion to

quash, and for no other purpose, and these depositions had no relation to anything else than the motion to quash.

The defendant company has continually, by its special appearances in the court, insisted upon the illegality of the service had upon it, and it has taken no action which can be regarded as a general appearance in the case."

The language of the Supreme Court in General Investment Company v. Lake Shore Etc. Ry. Co., 260 U. S. 261; 67 L. Ed. 244, at 252, is apposite. The court there held that a stipulation to the effect that certain evidence used in the state court upon a motion to quash should be used upon the same motion in the Federal court did not convert the appearance into a general one. It used this language:

"In the application whereon the new hearing was granted the company had declared that it was appearing specially for the purpose only of questioning the validity of the service. *That declaration, made at the outset, applied to and qualified every step taken by the company in bringing the question to the hearing and decision.* Joining in the stipulation was merely such a step."

If that language means anything it means, as applied to the situation at bar, that every step taken by Thomason in the furtherance of his motion to quash and procuring a favorable decision thereon was colored by his initial statement, which was reiterated from step to step, that this appearance was for the sole purpose of contesting jurisdiction over his person.

Counsel's attempt to distinguish the General Investment Company case is in line with all of their other attempted distinctions, in this,—that they would have the court brush aside the various authorities cited by appellee because they do not exactly coincide with this case upon the facts; counsel decline to squarely face the principles enunciated in those cases and seek to have the court establish in this instance a fixed arbitrary rule of waiver, notwithstanding the well established rule of the Federal courts that the matter is one of intent.

Counsel say that the intent, even under the Federal authorities, is to be gathered from the acts of the party. Doubtless this is true, but it is likewise true that the acts of the party who is charged with having waived his special appearance must be clear and convincing to the effect that he actually intended to waive the question of jurisdiction over the person, or those acts must in and of themselves be of such an unequivocal nature that on their face they are *necessarily inconsistent with a continued plea to the jurisdiction over the person.* In the absence of controlling authority, this court will treat the question as one of actual intention, under the rule of the Southern Pacific case, *supra;* and, in that connection, it is perfectly clear that there never was any intention on the part of Thomason to waive his plea to the jurisidiction but that on the contrary everything that he did was in furtherance and support of that plea.

Salmon Falls Mfg. Co. v. Midland Etc. Co., 285 Fed. 214, involved the case of an attachment of the property

of a non-resident. The defendant, for the purpose of limiting the recovery to the property attached, appeared specially for that purpose, denying jurisdiction otherwise over it and denying generally the merits of plaintiff's petition. At the opening of the trial the defendant moved the court to limit the scope of the hearing to the value of the property attached. No formal ruling was made upon this request and the trial proceeded to verdict and judgment. Personal judgment was entered against the defendant and the plaintiff sought to uphold it upon the theory that defendant's participation in the trial upon the merits converted his special appearance into a general one. Speaking of the motion made by defendant to limit the trial to the value of the property attached, the court said at page 218:

> "That this was defendant's first opportunity to so move is clear, and it is difficult to see in what words defendant's contention could be more explicitly stated. We have held that the question of general appearance is one of intent, actual or implied, and that *where the whole purpose of the defendant's application to the court is to protect itself from personal jurisdiction, the conduct which will make the motion unavailing and destroy its basis must be clear and unequivocal.* See Dahlgren v. Pierce (C. C. A.) at page 846; Grable v. Killits (C. C. A.), 282 Fed. at page 195. See, also, Citizens Savings & Trust Co. v. Railroad Co., 205 U. S. 46, 59, 27 Sup. Ct. 425, 51 L. Ed. 703. As applied to this case, we see no inconsistency between the rule so stated and the expression in Wabash Western R. R. Co. v. Brow,

164 U. S. at page 278, 17 Sup. Ct. at page 128 (41 L. Ed. 431), to the effect that 'a voluntary appearance * * * sometimes may result from the act of the defendant, even when not in fact intended. * * *

"The denial of personal jurisdiction, and the attempt to limit the scope of the hearing to one *in rem*—that is to say, to a recovery to be satisfied only out of the attached property—involved no inconsistency whatever. The trial of the action, if limited to satisfaction out of the property attached, involved precisely the same defense to the merits as if personal judgment was to be rendered. If the conclusion of the court below is correct, it is not readily perceivable how defendant could at one and the same time have contested jurisdiction over its person and exercised the right to defend the action to the extent of the value of the attached property. If the decision below is right, defendant could deny personal jurisdiction only by surrendering its defense to a recovery to be satisfied only out of the attached property." (Italics ours.)

The last quoted paragraph clearly indicates that the unfairness of the rule contended for by appellant in this case is a cogent reason for rejecting its legal proposition. In the Salmon Falls case the court in effect said that it would be destructive of substantial rights to hold that the special appearance was waived when defendant was placed in a position where he must, under plaintiff's contention, sacrifice other substantial rights in order to maintain his plea to the jurisdiction. So, here, appellant contends that the moving party

must sit still and permit the record of service to be changed without objection on his part and his motion to be thus indirectly defeated.

Pine Hill Coal Co. v. Cusicki, 261 Fed. 974, 977, and Yanuszauckas v. Mallory S. S. Co., 232 Fed. 132, 133, hold in effect that procuring an order extending time to plead does not work a general appearance. In the Yanuszauckas case the court said:

> "To assert that the defendant was compelled to accept a situation which might result in a default being taken against him while the court was considering its rights is both illogical and unfair."

It will be observed that in both of the last cited cases the extension of time to plead was procured in conjunction with and as a part of the special appearance, and therein lies the distinction between these cases and the cases cited on page 114 of appellant's brief. In the Yanuszauckas case the court said:

> "The defendant appeared specially for the sole purpose of moving to dismiss. The statement in the notice of appearance that the defendant appeared 'specially for the purpose of moving to dismiss the summons and complaint' prevents it from being considered as a general appearance."

And in the Pine Hill Coal Company case, 261 Fed. at 977, the court said:

> "The use of the phrase that it appeared specially for the purpose of setting aside the service of the summons, and at the same time, in the order to show cause extending its time to 'appear, demur or answer or otherwise act upon the sum-

> mons and complaint' prevents it from being considered a general appearance. It is only where the plaintiff in error pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived."

The recent case of Davenport v. Superior Court, 183 Cal. 506, is in point. In that case the defendants first procured an order extending time to plead and thereafter moved the court to quash service. The California Supreme Court held the order extending time did not work a general appearance, in view of the fact that it was really procured as a preliminary to the motion to quash. The language on page 511 is particularly pertinent. It should also be observed that the defendants in that case "appealed to the discretion of the court" when, as shown on page 509, they moved the court to set aside a default judgment which had been entered against them. Although the effect of this particular move was not expressly discussed in the opinion of the court, the ruling necessarily involved a holding that such application to the court, made in furtherance of the challenge to the jurisdiction over the person, did not work a general appearance.

Examination of appellant's authorities discloses the following situation:

In Everett Ry. etc. Co. v. U. S., 236 Fed. 806, the application for the order extending time to plead was the first appearance. It did not purport to be special and the special appearance was not attempted until a month after the extension of time had been procured.

Murphy v. Herring-Hall-Marvin Safe Co., 184 Fed. 495, discloses that the order extending time to plead was procured in the state court before removal; that in that order there was no reference to any special appearance and the motion to quash was first made after removal to the Federal court. At page 498, the court said:

> "Such an appearance may be either general, that is, without reserve, or it may be special, for a particular purpose; but if intended as special it must be so stated in some appropriate manner, otherwise it will be deemed a general appearance.
>
> "In this instance, as disclosed by the very comprehensive terms of the order, the application was without reserve, the order being sufficiently broad to enable defendant within the time given to plead to the complaint in any form in which under the statute he could be called upon to answer the cause of action set up. Moreover, the application was purely a voluntary one on the part of the defendant. * * *"

Briggs v. Stroud, 58 Fed. 717, was merely a case in which a general appearance had been originally entered by way of obtaining extensions of time to plead, but at the hearing counsel sought to have their appearance taken as special and to be permitted to plead to the jurisdiction, which application was denied.

Brookings State Bank v. Federal Reserve Bank, 291 Fed. 659. In this case a stipulation for an extension of time to plead was made on or about November 23rd and an order of court entered thereon. Thereafter, on December 26th, defendant attempted to make

a special appearance. At page 661 the court said, with respect to the stipulation:

> "Nothing is said from which to infer that defendant designed to reserve its right or privilege of objecting to the jurisdiction of the court over the person of the defendant."

The court also uses this language, which might well be applied to the situation at bar, in view of the highly technical nature of the position taken by appellant:

> "Another question is presented, which pertains to the *power of the court, in its discretion, to relieve the defendant of the effect of its general appearance, and allow it now to appear specially for contesting jurisdiction over the person. While it is obvious that the court is possessed of such power,* it is not at all clear that it should so exercise it in the present case. To permit the defendant to raise the question now would be to permit it to violate a solemn stipulation, in which the opposing party has acquired a valuable right, and this by extending to the defendant a favor asked for and granted. (Italics ours.)

Placek v. American Life Insurance Co., 288 Fed. 987, presents merely a case of a general appearance in the first instance and a belated attempt to thereafter make a special appearance.

The outstanding feature of the above discussed authorities relating to the effect of an order extending time to plead is that they all expressly or impliedly concede that such an application, when coupled with

a notice of special appearance, even though it is an "appeal to the discretion of the court," does not work a general appearance,—thus showing that it is not every appeal to the discretion of the court which works a general appearance; it is only those appeals to the court's discretion which are inconsistent with the special plea. Certainly the authorities do not establish the proposition that any appeal to the discretion of the court which is made for the purpose of furthering or effectuating the special plea works the destruction of the very plea in support of which the application is made. The proposition is illogical and unsound and finds no support in the authorities.

The result of the reversal of Judge James' order would certainly be startling. The court found that Jasper Thomason was never served with subpoena in such manner as to require him to appear in the action; he never did appear; and the default judgment which was entered against him was set aside by the lower court upon the ground that it was void for want of jurisdiction. If the order is reversed the effect will be that Thomason is held to have submitted himself to the jurisdiction of the court after the entry of judgment; that judgment, under appellant's contention and authorities, is now made a valid judgment to the same extent as if Thomason had originally been served with subpoena and had deliberately defaulted. Although he had a perfect right to stay out of court at the time of the trial, he is now, according to appellant's contention, legally convicted of fraud

and conspiracy and other wrongs and this result has been accomplished purely by the fortuitous circumstance that he has made a misstep (if such it be) in urging his point that the court had no jurisdiction over him. By reason of an act which he took in good faith for the purpose of effectuating his plea of lack of jurisdiction over the person, and which was taken only for the purpose of availing himself of that objection, his whole motion is subverted into a general appearance and has defeated itself. The result would not be so harsh had this thing occurred prior to the trial of the action, but coming, as it does, at this stage of the proceeding, it fastens as a valid judgment upon him a decree which convicts him of "grave wrongs," and under circumstances where he has not actually had his day in court or been summoned to come into court and present his defenses.

Wherefore, it is respectfully submitted that the orders from which appeals herein have been taken should be affirmed.

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Solicitors for Defendant Jasper Thomason, Appearing Specially Herein for the Purpose of Contesting Jurisdiction Over Person and Not Appearing Generally Herein.